III

IV

V

VI

VII

VIII

IX

X

XI

XII

TABLE OF AUTHORITIES CITED.

Cases	Page
Adams v. McCann, 317 U. S. 269	59, 63, 65
Adamson v. California, 332 U. S. 46	65, 112, 151
Allen, Ex parte, 52 Fed. 965, 78 Am. Dec. 1078	78, 87
Anderson v. Dunn, 6 Wheat. 204 U. S.) 2 Am.	75
Anderson v. State (Tenn. 1855), 2 Sneed 551	89
Arbaugh v. Tennessee, 322 U. S. 143	63
Avery v. Alabama, 308 U. S. 444	71
Ball v. United States, 140 U. S. 118	66
Barry v. Mail, 53 F. 2d 222	78, 101
Beauharnais v. Illinois, 343 Fed. 466, 125 N. E. 773	61
Bessinger-Lee v. United States, 322 U. S. 460	72
Betts v. Brady, 316 U. S. 455	63
Bessett v. Yale, 230 N. Y. 380, 130 N. E. 1350	101
Bridges v. California, 314 U. S. 252	1091
Bridges v. Wixon, 326 U. S. 135	58, 67, 71, 72, 73, 101
Brotherhood Trade Co. v. Hill, 281 U. S. 673	73
Brown v. Mississippi, 297 U. S. 278	63
Brown v. State, 98 Tex. 465	61
Bush v. Bush, 276 U. S. 201	101, 102
Bridgeport v. Adams, 258 U. S. 581	101
Carroll v. Commissioner, 286 U. S. 280	1091
Carlson v. Landon, 342 U. S. 524	67, 101
Chaplinsky v. Hampshire, 315 U. S. 568	77, 81, 83
Chambers v. Florida, 309 U. S. 227	63
Cleary v. State, 156 Fla. 858, 114 S. E. 815	61
Cole v. State, 95 Fla. 6 a. 12, 116 Fla. 587	61
Communications Ass'n et al. Wisconsin v. Public, 94 Fla. 104, 201 U. S. 321	58, 67
Cooke v. United States, 267 U. S. 517	73
Craig v. Harney, 331 U. S. 367	1091
Cummings v. Missouri, 4 Wall. 277	71
Davis v. Beason, 133 U.S. 333	101, 103
De Jonge v. Oregon, 299 U. S. 353	63
Delgadillo v. Carmichael, 332 U. S. 388	71, 72

PAGE

De Meerleer v. Michigan, 329 U. S. 663 ..... 61, 63
Diaz v. United States, 223 U. S. 454 ..... 37, 47, 65
Douglas, North From Malaya (1953), p. 5 102
Dowdell v. United States, 221 U. S. 325 ..... 49, 53, 54, 75, 106
Duffy v. State, 151 Md. 456, 135 Atl. 189 40
Dyson v. Mississippi, 26 Miss. 362 39
Endicott Co. v. Encyclopedia Press, 266 U. S. 285 75
Fiske v. Kansas, 274 U. S. 380 109
Fong Haw Tan v. Phelan, 333 U. S. 6 ..... 71, 72, 99
Fong Yue Ting v. United States, 149 U. S. 698 67
Foster v. Illinois, 332 U. S. 134 ..... 61, 70
Foster v. State, 70 Miss. 755, 12 So. 822 40
Francis v. Resweber, 329 U. S. 459 64
Frank v. Mangum, 237 U. S. 309 ..... 51, 62
French v. State, 85 Wis. 400 38
Frey v. Calhoun, 107 Mich. 130, 64 N. W. 1047 40
Galvan v. Press, 347 U. S. 522 ..... 67, 69, 72, 108
Gannon, In re, 16 R. I. 537 ..... 74, 78, 88, 89
Gianes v. Washington, 277 U. S. 81 ..... 51, 61
Gibbs v. Burke, 337 U. S. 773 ..... 61, 63
Glasser v. United States, 315 U. S. 60 63
Gray v. State, 158 Tenn. 370, 13 S. W. 2d 793 41
Harisiades v. Shaughnessy, 342 U. S. 580 69
Hawk v. Olson, 326 U. S. 271 63
Heikkila v. Barber, 345 U. S. 229 67
Hendrickson, In re, 12 Wash. 2d 600, 123 P. 2d 322 93
Hernandez v. Texas, 347 U. S. 475 63
Holden v. Hardy, 169 U. S. 366 48
Holton v. State, 2 Fla. 476 40
Hopt v. Utah, 110 U. S. 574 ..... 48, 49, 58, 59
Howard v. Kentucky, 200 U. S. 164 51
Hurtado v. California, 110 U. S. 516 61
Hyun v. Landon, 219 F. 2d 404 20
J. H. Landman, Human Sterilization (1932), pp. 116-117 93
Johnson v. Eisentrager, 339 U. S. 763 67

PAGE

Johnson v. United States, 318 U. S. 189 52
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123 97
Jordan v. De George, 341 U. S. 223 ..... 72, 99
Kessler v. Strecker, 307 U. S. 22 67
Kirby v. United States, 174 U. S. 47 ..... 35, 36, 53, 54, 74, 105
Knauff v. Shaughnessy, 338 U. S. 537 66
Kwock Jan Fat v. White, 253 U. S. 454 ..... 67, 72
Kwong Hai Chew v. Colding, 344 U. S. 590 ..... 67, 68
Lambert, Matter of, 134 Cal. 626, 66 Pac. 851 ..... 78, 85, 86
Lewis v. United States, 146 U. S. 370 ..... 32, 59
Leyra v. Denno, 347 U. S. 556 64
Lisenba v. California, 314 U. S. 219 61
Lyons v. Oklahoma, 322 U. S. 596 61
Mattox v. United States, 156 U. S. 237 ..... 53, 54, 74, 105
Maxwell v. Dow, 176 U. S. 581 ..... 61, 69
McNabb v. United States, 318 U. S. 332 75
Mickle v. Henrichs, 262 Fed. 687 91
Miller v. State, 29 Neb. 437, 45 N. W. 451 40
Milligan, Ex parte, 4 Wall. (71 U. S.) 2 74
Minnesota ex rel. Pearson v. Probate Court, 309 U. S. 270 ..... 78, 81, 82
Mooney v. Holohan, 294 U. S. 103 63
Moore v. Dempsey, 261 U. S. 86 62
Motes v. United States, 178 U. S. 458 ..... 54, 55, 56, 74, 105
Moyer v. Peabody, 212 U. S. 78 74
Moynihan, In re, 332 Mo. 1022, 62 S. W. 2d 410 ..... 78, 83, 85
Near v. Minnesota, 283 U. S. 697 71
Ng Fung Ho v. White, 259 U. S. 276 ..... 66, 71, 99
Offutt v. United States, 348 U. S. (Adv. Ops.) 11 75
Oliver, In re, 333 U. S. 257 ..... 63, 65, 75
Opinion of the Justices, In re, 230 Ala. 543, 162 So. 123 96
Ownbey v. Morgan, 256 U. S. 94 75
Palko v. Connecticut, 302 U. S. 319 ..... 61, 70, 71
Palmer v. Commonwealth, 143 Va. 592, 130 S. E. 398 41

PAGE

Patton v. United States, 281 U. S. 276 59
Pennekamp v. Florida, 328 U. S. 331 109
People v. Beck, 305 Ill. 593, 137 N. E. 454 40
People v. La Barbera, 274 N. Y. 339, 8 N. E. 2d 884 ..... 46, 47
People v. Perkins, 1 Wend. (N. Y.) 91 40
Ponzi v. Fessenden, 258 U. S. 254 40
Powell v. Alabama, 287 U. S. 45 ..... 61, 62, 63, 65
Price v. Johnston, 334 U. S. 266 ..... 38, 52
Prine v. Commonwealth, 18 Pa. 103 39
Regina v. Templeman (1700), 1 Salk 56, 91 Eng. Rep. 54 44
Rex v. Aikin (1765), 3 Burr 1785, 97 Eng. Rep. 1098 43
Rex v. Baker (1745), 2 Strange 1239, 93 Eng. Rep. 1156 43
Rex v. Bodmin Justices, 1 K. B. 321 97
Rex v. Crowther (1786), 1 T. R. 125, 99 Eng. Rep. 1009 ..... 43, 57
Rex v. Harris and Duke (1689), 1 Ld. Raym. 267, 91 Eng. Rep. 1075 44
Rex v. Hays (1730), 2 Strange 843, 93 Eng. Rep. 888 44
Rex v. Ladsingham, Sir T. Raym., 193, 83 Eng. Rep. 101 43
Rex v. Ledgingham, 1 Ventris 97, 86 Eng. Rep. 67 43
Rex v. Legingham (1670), 2 Keble 687, 84 Eng. Rep. 432 43
Rex v. Niccolls (1745), 2 Strange 1227, 93 Eng. Rep. 1148 43
Rex v. Vipont (1761), 2 Burr 1163, 97 Eng. Rep. 767 ..... 43, 57
Riddle v. Commonwealth, 216 Ky. 220, 287 S. W. 704 40
Rochin v. California, 342 U. S. 165 64
Schafer v. State, 118 Tex. Cr. 500, 40 S. W. 2d 147 41
Schneider v. State of New Jersey, 308 U. S. 147 109
Schneiderman v. United States, 320 U. S. 118 ..... 72, 73
Schwab v. Berggren, 143 U. S. 442 ..... 37, 47, 49, 59
Shaughnessy v. Mezei, 345 U. S. 206 ..... 66, 67
Shields v. Shields, 26 Fed. Supp. 211 ..... 78, 88
Shields v. United States, 273 U. S. 583 40
Simon v. Craft, 182 U. S. 427 ..... 70, 77, 78, 80
Skinner v. Oklahoma, 316 U. S. 535 ..... 91, 92
Sleeper, Appeal of, 147 Me. 302, 87 A. 2d 115 ..... 78, 89
Slocovitch v. State, 46 Ala. 227 40

PAGE

Smith v. Command, 231 Mich. 409, 204 N. W. 140.....91, 96
Smith v. O'Grady, 312 U. S. 329..... 63
Smith v. Texas, 311 U. S. 128..... 63
Snyder v. Massachusetts, 291 U. S. 97.....35, 51, 52, 65, 70, 75
State v. Chandler, 128 Ore. 204, 274 Pac. 303..... 39
State v. Dixon, 185 N. C. 727, 117 S. E. 170..... 40
State v. Hoffman, 78 Mo. 256..... 40
State v. Howerton, 100 W. Va. 501, 130 S. E. 655..... 41
State v. Hurlbut (Conn. 1784), 1 Root 90..... 39
State v. Hutchinson, 163 La. 146, 111 So. 656..... 40
State v. Mannion, 19 Utah 505, 57 Pac. 542..... 41
State v. Reidel, 26 Iowa 430..... 40
State v. Schasker, 60 N. D. 462, 235 N. W. 345..... 41
State v. Shutzler, 82 Wash. 365, 144 Pac. 284..... 41
State v. Thomas, 64 N. C. 74..... 40
State v. Vanella, 40 Mont. 326, 106 Pac. 364..... 40
Summeralls v. State, 37 Fla. 162..... 39
Temple v. Commonwealth, 77 Ky. 769..... 38
Thornhill v. Alabama, 310 U. S. 88.....109
Tumey v. Ohio, 273 U. S. 510..... 62
Twining v. New Jersey, 211 U. S. 78.....61, 69
United States v. Carolene Products Co., 304 U. S. 144.....109
United States ex rel. Bilokumsky v. Tod, 263 U. S. 149.....67, 69
United States ex rel. Vajtauer v. Commissioner, 273 U. S. 103
..... 67, 69
Uveges v. Pennsylvania, 335 U. S. 437..... 63
Valdez v. United States, 244 U. S. 432.....49, 51
Waley v. Johnston, 316 U. S. 101..... 64
Walker v. Sauvinet, 92 U. S. 90..... 61
Watts v. Indiana, 338 U. S. 49..... 62
Weihofen, Mental Disorder as a Criminal Defense (1954), p. 43-94
West v. Louisiana, 194 U. S. 258.....50, 74, 75, 106
Whittaker v. State, 173 Ark. 1172, 294 S. W. 397..... 40
Williams v. New York, 337 U. S. 241.....40, 52
Williams v. Smith, 190 Ind. 526, 131 N. E. 2..... 93

PAGE

Winters v. New York, 333 U. S. 507 109
Wong Yan Sung v. McGrath, 339 U. S. 33 ..... 67, 68, 71
Yamataya v. Fisher, 189 U. S. 86 66

PUBLICATIONS

17 Boston University Law Review (1937), Sterilization Laws; Their Constitutionality, pp. 246, 247-249 ..... 90, 91, 94
16 Columbia Law Review (1916), pp. 18-36, note 44
Harper's Magazine, February, 1954 102
Hughes, Eugenic Sterilization in the United States (1940), Supp. No. 162 to the Public Health Reports, U. S. Public Health Service 90, 91
Los Angeles Times, June 24, 1953 102
Los Angeles Times, August 8, 1955 102
Newsweek, June 9, 1952 102
New York Times, January 31, 1950 102
New York Times, June 5, 1952 102
New York Times, July 19, 1953 102
28 North Carolina Law Review (1950), pp. 205-215, note 42
Report of the Committee of the American Neuralogical Association for the Investigation of Eugenical Sterilization, Eugenical Sterilization (1936), Chap. II, pp. 7-21 ..... 90, 91
23 Temple Law Quarterly (1949), pp. 151-153, note 42
The London Times, April 21, 1954 102
12 Washington and Lee Law Review (1955), pp. 230-238, note 42, 44

RULES

Federal Rules of Criminal Procedure, Rule 43 41
Preliminary Draft of Federal Rules of Criminal Procedure (1943), Rule 45, note 41

STATUTES

United States Code, Title 28, Sec. 1254(1) 2
United States Constitution, First Amendment 109
United States Constitution, Fourth Amendment 60

PAGE

United States Constitution, Fifth Amendment.....
.....2, 3, 21, 25, 27, 48, 50, 52, 60, 68
United States Constitution, Sixth Amendment.....
.....24, 34, 37 47, 48, 50, 60, 68
United States Constitution, Fourteenth Amendments..... 48

TEXTBOOKS

28 American Jurisprudence, pp. 674-679 .....78, 86
6 American Law Reports 2d, pp. 997-1002, anno..... 41
100 American Law Reports, pp. 478-487, anno. 41
7 Bacon, A New Abridgment of the Law (5th Ed., Corrected), p. 3..... 43
4 Barron & Holtzoff, Federal Practice and Procedure (Rules Ed., 1951), pp. 394-395..... 41
1 Bishop, New Criminal Procedure (4th Ed.), Chap. XVIII, The Presence of the Prisoner in Court..... 41
4 Blackstone's Commentaries (1769) *318..... 42
2 Coke on Littleton, 227b..... 42
1 Cooley, Constitutional Limitations (8th Ed.), pp. 662-667....
.....33, 54
23 Corpus Juris Secundum, pp. 303-304..... 33
23 Corpus Juris Secundum, p. 973..... 41
44 Corpus Juris Secundum, p. 78 .....78, 86
11 Cyclopedia of Federal Procedure (3d Ed.), Sec. 39.79..... 41
11 Cyclopedia of Federal Procedure (3d Ed.), Sec. 43.01, note 3 41
2 Hale, Pleas of the Crown, pp. 300, 298..... 42
Orfield, Criminal Procedure From Arrest to Appeal (1947), pp. 345-346 .....44, 46
Orfield, Criminal Procedure From Arrest to Appeal (1947), pp. 349-351 45
Orfield, Criminal Procedure From Arrest to Appeal (1947), pp. 413-417 42
2 Pollock and Maitland, A History of the English Law (2d Ed.) pp. 598-603..... 44

PAGE

Stephen, A Digest of the Law of Criminal Procedure (1883), Art. 302 46
1 Stephen, A History of the Criminal Law of England (1883), pp. 14, 23 100
1 Stephen, A History of the Criminal Law of England (1833), Chaps. VIII, IX, pp. 73, 244, 246, 254 ..... 44, 45
Wharton, Criminal Pleadings and Practice (9th Ed., 1889), p. 392 ..... 33, 41, 44
Whitman, Federal Criminal Procedure (1950), Sec. 43.3, p. 348 42
5 Wigmore on Evidence, p. 127 32
5 Wigmore on Evidence (3d Ed.), pp. 146 and 191 56

IN THE

Supreme Court of the United States

October Term, 1955

No. 201

DAVID HYUN,

Petitioner,

vs.

HERMAN R. LANDON, District Director, Immigration and Naturalization Service,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONER.

Opinions Below.

The opinion of the Court of Appeals [R. 45-53] is reported at 219 F. 2d 404. The opinion of the District Court [R. 37-38] is unreported. The opinions of the Hearing Officer of the Immigration and Naturalization Service [R. 94-98], of the Assistant Commissioner of the Immigration and Naturalization Service [R. 59-62] and of the Board of Immigration Appeals, United States Department of Justice [R. 56-58] are unreported.

Jurisdiction.

The judgment of the Court of Appeals was entered January 31, 1955. [R 53.] Rehearing was denied on April 7, 1955. [R. 53-54.] The petition for a writ of certiorari herein was filed July 1, 1955, and was granted October 10, 1955. [R. 54.] The jurisdiction of this Court rests upon 28 U. S. C., Section 1254(1).

Question Presented.

Whether in a deportation proceeding it violates due process of law, under the Fifth Amendment, and the constitutional requirements of fair hearing thereunder, to take evidence against the alien through "*ex parte* depositions" of witnesses in Hawaii, 2,500 miles from the place of hearing and of the alien's residence, Los Angeles, particularly in consideration that,

(a) the "*ex parte* depositions" constituted not merely a part but the *entirety* of the substantive evidence adduced on behalf of the government, and, being taken as described, without the presence or agreement of either the alien or his counsel, characterized the hearing as *total* trial *in absentia;*

(b) the deposition "testimony" was bottomed and founded upon "identification" of the affected alien *solely* on basis of a passport-photo and passport, issued to the name of the alien affected, and so showing *upon its face,* thereby compounding, and emphasizing, the injury of denial of right of confrontation;

(c) the deportation proceedings affect a lawfully-admitted, long-resident alien, married to a citizen

and father of citizen children, assimilated fully to American habits, language, culture and life, and where there was involved in deportation jeopardy not only to liberty, but to life, or of physical persecution;

(d) the procedure of foreign depositions taken away from the place of hearing was required by no consideration of necessity or compelling cause, but was undertaken, and avowedly, merely to serve government convenience and economy.

Constitutional Provision Involved.

The Constitutional provision involved is the due process of law provision of the Fifth Amendment to the United States Constitution reading, "No person shall be . . . deprived of life, liberty or property without due process of law. . . ."

Statement of the Case.

The crux of the case at bar is whether gravest process —affecting deeply liberty and even jeopardy of life—can be due process, with disregard—and *total*—of right of presence of the accused, without justification either in waiver or in necessity, and undertaken only to serve government economy and convenience.

The proceedings below were in Habeas Corpus to review constitutionality, including particularly challenge as to fair hearing and procedural due process of law, of a final order of deportation.

Involved in the proceedings were heaviest issues of personal liberty and jeopardy even to life.

David Hyun, petitioner here and below, was born in Seoul, Korea, January 3, 1917. [R. 203.]* When petitioner was a child but seven years old, his parents moved with him permanently to the United States, and petitioner, with his mother and father, entered the United States lawfully, and for permanent residence, at Honolulu, Hawaii, May 24, 1924. [Ex. 4; R. 112, 207.] Ever since that date petitioner has continuously resided in the territorial United States. [R. 207, 206.] On September 1, 1947, he, together with his parents, moved, lawfully to Los Angeles, California [R. 206], and since such date he has lawfully and continuously resided there. [R. 206.]

Petitioner is married, and the father of two minor children, sons, all citizens by birth of the United States [R. 4, 219], and is an architect by profession. [R. 4.]

October 31, 1950, petitioner was arrested in Los Angeles, where he was resident, by warrant of the Immigration and Naturalization Service. The warrant charged petitioner with being deportable under the Act of October 16, 1918, as amended, 1950, upon charge of "[having] been, after entry, a member of the following class set forth in . . . said Act: an Alien who was a member of the Communist Party of the United States." [R. 227, 228.]

Under the said warrant petitioner was taken into immediate custody, and he was thereafter continuously held in custody by the Service throughout the whole of

---

*Exhibit 2, indicates birth in "Kirin, Manchuria". Petitioner testified he believed Seoul, Korea, was his true birthplace, but of his own knowledge he knows with absolute certainty, no birthland. [R. 203.]

the hearings affecting his deportability hereafter described. [R. 126, 130; Ex. 1.] During the whole of said period, petitioner was denied totally right of bail. [R. 130, 131; Ex. 1.]

Hearing was held in petitioner's cause in Los Angeles, California, commencing November 22, 1950. Petitioner was present there, although in custody-restraint. [R. 98, 126, 130.]

At the very opening of the said proceedings, and after only the introduction of brief documentary evidence affecting alienage only [R. 108-114], the Examining Officer, on behalf of the government, moved for leave to take the depositions *in Hawaii* of four named persons, Richard Kageyama, Easter Doyle, Donald Uesugi, and Ichiro Izuka. [R. 114.]

No cause or necessity was shown, or suggested, *then* or *ever,* for the proposal so to take "depositions"—in place of producing such witnesses at the place of hearing, to confront petitioner, and to testify in his presence—save for the statement by the Examining Officer that: "the persons mentioned are residents in the Territory of Hawaii, and for that reason the motion [is] made . . ." [R. 118.]

The motion was granted. [R. 117.]

Thereafter the "depositions" of such four persons, in Hawaii, *ex parte,* as is hereafter related, were conducted —without the presence of petitioner, or of any counsel representing him—and the said depositions, so conducted, constituted ultimately, as is hereafter related, the *sole* and *only* evidence offered or introduced by the government on the substantive issue of grounds of deportability.

The only evidence introduced in the presence of petitioner, at the Los Angeles proceedings, was documentary evidence relating only to the issue of alienage. Thus, though petitioner was granted supposed "hearing" in Los Angeles, California, and was brought in custody-restraint to be present there, in actuality the whole of the substantive evidence affecting his cause—and hence his "hearing"—was taken and received in proceedings conducted in Honolulu, Hawaii, without his presence. Indeed, at one point in the Los Angeles proceedings the Examining Officer inadvertently acknowledged as much, and was reprimanded for this breach of form.

> "*Hearing Officer:* Each of you gentlemen have referred to a hearing in Honolulu, in the Territory of Hawaii. There was no hearing in the case of David Hyun in the Territory of Hawaii. Depositions pertinent to the issues in this case were taken in the Territory of Hawaii and we have those depositions here to be considered in the hearing which is here, not in Honolulu.
>
> "*Examining Officer:* That's true. I erroneously referred to the taking of the depositions at the hearing.
>
> "*Hearing Officer:* It was not a hearing."
>
> —[R. 133].

As previously described, petitioner, at the time of the motion to take the Hawaiian depositions, was in confinement under custody of the Service. [R. 126, 130, 131.] At the time of the making and granting of the motion, and at the time of actual taking of the depositions, petitioner was not even advised he could, in any manner or

course, attend the depositions, but was advised instead, by the Hearing Officer, that:

> "Counsel will be given notice of the date those witnesses will appear . . . in Honolulu, T. H., and at that time, the respondent may be represented there by counsel, and may present witnesses, and counsel may submit interrogatories, which will be propounded if he so desires on the dates the named witnesses appear in Honolulu."
>
> —[R. 117-118].

Before the taking of the depositions, additionally, petitioner was given written notice in the following form only:

"Mr. David Hyun
c/o Immigration and Naturalization Service,
Detention Quarters,
Terminal Island,
San Pedro, California.

Dear Sir:

"Pursuant to the order of Hearing Officer John B. Bartos on November 22, 1950, in your case, depositions will be taken from the following-named persons on December 18th and 19th, 1950, at the Immigration Station, Honolulu, T. H.:

Richard C. Kageyama, Easter J. Doyle, Donald Uesugi, Ichiro Izuka

"Your counsel may appear personally or through associate counsel during the taking of these depositions, or you may submit interrogatories. If interrogatories are submitted they should arrive in this office not later than 9:00 A. M., December 18, 1950."

[R. 266-267].

This notice was delivered to petitioner in confinement. [R. 267, 126, 132-133.]

Before [R. 114-119] and after [R. 122-123, 129-133, 216-220] the motion for and the taking of the depositions [which were taken in Hawaii, December 18, 1950—R. 229 *et seq.*], counsel for petitioner objected to the proposed procedure as violating Constitutional procedural due process and denying the right of David Hyun to be present, and denying the right to confrontation of witnesses and to cross-examination, and the right to representation by, and consultation with, counsel, and repeatedly, and earnestly, requested either that the witnesses be produced at the hearing in Los Angeles, or that petitioner, counsel, or both, all alternatively, be transported to the place of the taking of the depositions to be present there. All of these requests and motions were denied. [R. 117, 119, 130, 132-133, 216, 220.]

Prior to the order granting the government request that the depositions be taken, and to the taking of such in fact in Hawaii without petitioner's presence, counsel was interrupted and not even permitted to fully state his objections to such proposed action. [R. 114-119.]

After the depositions were taken—without the presence of petitioner, or of counsel, as above stated—the same were produced in Los Angeles and offered in evidence in the Los Angeles proceedings, March 13, 1951. [R. 120.] On their offer, counsel stated the objections above-related to their admission, and requested that at least for purposes of cross-examination provision be made for right of David Hyun to be present at a hearing with presence of the witnesses, for right of confrontation and cross-examination and for effective right of counsel, with right of consultation. [R. 122-123, 129-133, 216-220.] These were denied. [R. 130, 132-133, 216, 220.]

When the depositions were offered in evidence in Los Angeles, March, 1951, as above described, the Examining Officer, without prior indication of such suggestion, declared, *after the fact,* that David Hyun could have been present, *personally,* as well as with or by counsel, if willing to pay for the expenses of transporting himself, and guards to secure him, had he so requested and offered. Witness:

> "*Examining Officer:* I think the record should . . . reflect that if Mr. Hyun had desired he could have been there in person too if he could have made the financial arrangements.
>
> "*Counsel:* Mr. Hyun was in custody at that time.
>
> "*Examining Officer:* That's right, he was in custody but there was no request on his part at any time after he received the notice of the fact that depositions were to be taken that he could be present at the hearing and if he had so indicated arrangements would have been made by the government to have him brought to Honolulu under proper safeguards."
>
> —[R. 132-133].

And, subsequently:

> "*Examining Officer:* The government does not feel under any obligation to transport witnesses at great expense over thousands of miles. The taking of depositions is a recognized and accepted and acknowledged form of taking testimony under such conditions.
>
> "At the time the depositions were taken in Honolulu counsel and respondent were notified as to the date the depositions would be taken. They could have been present if they so desired, and even though Mr. Hyun is in custody if he had indicated a willingness to be present arrangements would have been made to have him go to Honolulu under proper escort.

However, that would have had to be under his own expense if he wanted to be present. That was up to him and that was up to counsel. They did not see fit to avail themselves of that and counsel in the alternative was given an opportunity to prepare cross-interrogatories. He too declined to do this."

—[R. 217].

After the admission of the depositions, counsel, in urging the objections and motions above related seeking right of David Hyun to be rendered present before the witnesses at least for cross-examination, stressed and declared the indispensable importance of fair trial, and of due process, in a deportation proceeding as serious as at bar, stating in part:

"*Counsel:* . . . I want to point out to the Hearing Officer that this is not a question of one party suing another party for some money or a judgment or for damages; it isn't just an ordinary criminal action where a man might be penalized by some monetary sum or even by jail for six months or a year. This is a deportation matter and . . . even though it is not technically considered a criminal matter [a deportation matter], can be far more onerous, and it is in this case . . . because in this case David Hyun has been living within . . . the boundaries of the United States since he was seven years old and he is 34 today—27 years within the United States . . . It . . . seems to me when there is as much at stake [including right] to remain with his wife and two children [the matter], is an important issue. This is far more important than an ordinary simple criminal matter or the most serious civil matter, and it . . . seems to me that we don't ask very much of the Department of Justice to spend a few hundred dollars to transport David

Hyun to Honolulu so he can be there . . . so that he may be present to cross-examine witnesses. . . . [It] is a right of . . . a defendant . . . to confront the witnesses against him. It has been classically and is now considered . . . one of the fundamental necessities to a fair hearing in the terms of what we call due process. Here are three witnesses testifying against David Hyun to matters which if they were believed and if they are properly in evidence and so on, could deport this man from his own home and after 27 years, and they are not required to look at David Hyun, to watch him, to have to face him, while they make these alleged statements. * * *

"I really want to urge this sincerely upon you, Mr. Bartos, that if necessary recess be called that this matter may be considered. The motion which is now before you is the motion I made before, namely to have Mr. Hyun transported to Honolulu that he may be present at the cross-examination of these three witnesses, or in lieu of that, that they be brought here so that we may cross-examine them in Los Angeles with Mr. Hyun present or in lieu of that that the depositions be stricken and all the testimony of these witnesses taken in Honolulu be stricken from the record."

—[R. 218-220].

The Hearing Officer ruled the depositions were entirely proper without requirement of presence, because in deportation there was no duty in any manner to produce witnesses for personal presence at a hearing, nor duty to transport counsel or accused to the place of hearing of witnesses by depositions. Said the Hearing Officer:

"In deportation proceedings the government does not have the burden of sending the respondent or

his counsel to the place where depositions are taken. Therefore, your objection on that ground is overruled. * * * As to the matter of the detention of the respondent that is not within my province to release him or detain him . . . The Attorney General ordered him detained."

—[R. 130-131].

Counsel urged that in other deportation proceedings in comparable premises, witnesses had been transported to the place of hearing, for confrontation, and counsel referred to examples of such action affecting testimony by one Paul Crouch. [R. 216-8.] The Hearing Officer commented, in reply:

"*Hearing Officer:* I will answer it. . . . I will state for the record that witnesses have been brought from various places to testify in deportation hearings. However, the motion was made that depositions be taken in this case in Honolulu. That motion was granted. Counsel was notified of the date, place and time that they were to be taken and notified that the respondent could be represented by counsel at that time. He was not represented. * * * The motions of counsel are denied."

—[R. 218-220].

As previously stated, the depositions were taken December 18, 1950, in Honolulu, Hawaii, and at their taking petitioner was not present nor was he represented by any person or counsel. The depositions were taken *ex parte*, by an examining officer and a hearing officer, and these [R. 229] not even the officers charged with conducting the proceedings in Los Angeles. [R. 98.]

Of the four deposition witnesses, the first, Richard Kageyama, refused to testify as to any subject beyond

identifying himself, invoking the privilege of the Fifth Amendment. [R. 232-233.] His testimony, therefore, was disallowed. [R. 95.]

The remaining three deposition witnesses were examined by an examining officer, without objections from any source, and, of course, without cross-examination, and without, as well, restraint or discipline of any manner undertaken by the acting Hearing Officer. [R. 229-266.] The examination was characterized in its entirety by grossest impropriety in questioning, and by questions crudely, even abusively, leading and suggestive in form and in import, and including open, unashamed invitations to the witnesses to express, or hazard, conclusions, opinions, and even "guesses." [R. 233-266, and, especially, as illustrative, R. 234-235, 236-239, 246, 249-252, 261-266.]

Despite the character of the examination, the "testimony" of Easter Doyle reached no probative matter. [R. 259-266.] He averred, simply, that he considered discussions of the subject of communism "dry" [R. 262], and that David Hyun had "not directly" talked to him of such subject [R. 261], and that he did not "know directly whether he was one [Communist Party member] or not, but my belief [was] that he was one" [R. 262]; that he had "No reason at all," to doubt he was a member. [R. 263.] The Hearing Officer disallowed the testimony of Doyle in its entirety as being lacking in probative value or significance. [R. 95.]

Only two of the depositions—those of Uesugi and Izuka—were ultimately accepted as of evidentiary consequence. These, only, were made the testimonial basis of the Hearing Officer's decision. Said the Hearing Officer:

> "Of the depositions taken from the four persons [in Hawaii] only the depositions of two of those persons are pertinent and relevant to the issues in this case. They are the depositions of Donald P. Uesugi and Ichiro Izuka."
>
> —[R. 94-95].

In their depositions [R. 233-241 and 241-259], Uesugi and Izuka "testified" to alleged membership in the Communist Party by petitioner (in Hawaii between 1946 and 1947-1948) in only the most conclusionary manner, without evidentiary foundation and in response to most grossly leading and "educative" questions, and, moreover, connected and related in *every* instance with no activity save the most lawful, and constitutionally protected, acts of speech and expression of opinion.

Importantly, both Uesugi and Izuka, as with the witness, Easter Doyle, "identified" petitioner as the subject of their testimony *only* by being shown and asked to examine *Exhibit 2*—a Chinese passport-photo and passport, issued to "David Hyun" and *plainly so showing upon its face.* [R. 228; Ex. 2; and see R. 234 and 244-245; *cf.* R. 108-109.]

Uesugi [R. 233-241], after "identifying" [R. 234] petitioner *only* in the manner above stated, "testified" that petitioner was "as far as I am concerned I think he is a Communist Party member" [R. 234], because seen by him at from four to six meetings of people "I think they are communists" [R. 238], meetings characterized by discussion "something like concerning labor movements" [R. 237], and which "were educational meetings, sometimes social" [R. 235], concluded by the witness to be "closed" meetings because "they closed the doors." [R. 238.]

Petitioner was conceived by Uesugi to be a Communist Party member because "I have no reason for believing that he was not a communist" [R. 239], and "because it is a meeting and nobody else would be in it." [R. 239.]

Izuka, in his deposition [R. 241-259], similarly "identified" petitioner from the passport-photo and passport embodied in Exhibit 2, in the manner and premises above stated [R. 244-245], and on such basis declared a person thus identified by him attended not more than three meetings believed and understood by him to be "closed" meetings of the "executive board" of the Communist Party in Hawaii. The subject matter discussed at these meetings were improvement of the "morale" of the longshoremen's union in Hawaii [R. 246], the question of the morale of striking sugar workers at certain plantations [R. 248], and discussion of Republican and Democratic candidates for Territorial election of representatives to the United States Congress. [R. 248-249.] Izuka never personally heard the person identified by him discuss "his party membership" [R. 250], and, although he talked to him—on "very few occasions" [R. 250]—never heard him discuss "any party business" [R. 250], a fact explained by him: "I think it was known to Communist Party members that we shouldn't discuss party matters in such social gatherings." [R. 250.] He also "testified" one Carol Abe in a certain incident was discharged from employment as an office worker, ". . . and David Hyun was, I believe, in official capacity representing the office workers union. And he took the matter up with Jack Hall, and Jack Hall and Dave Thompson discharged Carol Abe as office clerk." [R. 251.] This incident he described as "Well, within the Communist Party of discharging another party member from an office job." [R. 251.] Re-

specting the meetings of the "Executive Board," above described, Izuka testified he "saw David Hyun [there] representing the Punch Bowl group." [R. 245.] He also testified he himself attended these three "Executive Board" meetings, though he was not a member of the said Board, on the basis of invitation extended to him because of his interest in the subject of discussion—issues relating to union and election subjects. [R. 245-249.] He further testified, in other connections, as previously stated, that "David Hyun" was a representative of the "Office Workers Union." [R. 251.] Why "David Hyun" might not also have been attending such meetings as he described as an invited observer, with an interest in the subjects and discussion because of union representation, is a question neither answered, nor asked.

The four *ex parte* depositions described above constituted the *only* government evidence against the petitioner. On the basis avowedly of such depositions, the Hearing Officer recommended an order for petitioner's deportation. [R. 94-98.]

As previously observed, the Hearing Officer denied all motions by counsel for petitioner for production of the witnesses for cross-examination and confrontation, or for transportation of petitioner, or counsel, or both, all alternatively, to the witnesses for confrontation. [R. 117, 119, 130, 132-133, 216, 220.] The Hearing Officer declared simply:

> "In deportation proceedings the government does not have the burden of sending the respondent or his counsel to the place where the depositions are taken. Therefore, your objection on that ground is overruled."
>
> —[R. 130].

Petitioner duly filed exceptions to the proposed order of deportation of the Hearing Officer, the exceptions being addressed in course of law to the Commissioner of the Immigration and Naturalization Service. [R. 65-67.] The Assistant Commissioner, August 1, 1951, adopted and approved the decision of the Hearing Officer, and ordered deportation of petitioner. [R. 59-62.] In his decision, the Assistant Commissioner, respecting the taking of the depositions in Hawaii without the presence of petitioner, stated simply:

> "Counsel . . . protests that the hearing officer permitted depositions to be taken in Hawaii, without providing transportation to that place for the respondent or counsel. The law requires no such provision."
> —[R. 61].

Petitioner duly appealed the order of the Assistant Commissioner to the Board of Immigration Appeals. Before the said Board, the final and dispositive administration agency beneath the Attorney General, petitioner, through counsel [R. 62-64], once again protested the procedure of the *ex parte* depositions, taken without the presence of petitioner, as violating due process and fair hearing, and once again moved that at least for the purposes of cross-examination provision be made for a hearing to be conducted in petitioner's presence, urging that the witnesses be ordered produced in Los Angeles, at the place of hearing, or that petitioner be transported to Hawaii, by the government, and at government expense, with whatever guards be deemed needed, and observing that petitioner was without financial funds to pay to send

himself, with guards, there, at private expense.* Counsel emphasized that the depositions constituted the *sole* evidence of substantive deportability. [*"Attorney*: * * * The core of the charge—the main thing—was evidence taken in Honolulu."—R. 64.]

December 1, 1952, the Board of Immigration Appeals denied all the said objections and motions of counsel, and affirmed the order of the Assistant Commissioner. [R. 56-58.] Respecting the taking of the depositions in Hawaii without presence by petitioner, the Board of Immigration Appeals, in its opinion, declared:

> "Counsel now contends that the alien is not financially able to send a representative to Honolulu to appear for him, and was not able to do so in November or December of 1950. There is no provision of law or regulations which requires that the United

---

*"Attorney: The only evidence against him in the case consisted of testimony taken by deposition, of witnesses in Honolulu. [The] alien, who at that time was in custody throughout the hearings, was told that he can have someone present there, and he was told either at that time or at the time when the depositions were taken, that if he wanted to, and was willing to pay the expense of himself and I presume of at least two guards to accompany him from California to Honolulu, he might have been present at Honolulu where the depositions were taken. Obviously he had not the money to do that, or to hire an attorney in Honolulu. He did have an attorney in California. * * *

Mr. Ludwig [Board member]: Did he have an attorney or any representative at the time the deposition was taken in Honolulu?

Attorney: *No*, Sir: Nobody represented him there. * * *

Chairman: Your application is what, specifically?

Attorney: My application is that the case be sent back for a hearing so as to produce competent testimony, not by deposition.

Chairman: You want to bring the witness from Honolulu to San Francisco?

Attorney: That's correct: It's a burden upon the Government. I don't think due process can be done away with because it might be somewhat expensive to the Government. That was the argument in the case in which Mr. Justice Jackson just refused to listen to that. The fact it is going to be an expense is not enough to take away due process. * * *

Chairman: All right, Sir." [R. 63-4.]

States Government provide transportation for an alien or counsel to the place of hearing in a situation such as in this case where the respondent resides in the state of California and depositions were taken in Hawaii."

—[R. 56-58].

Thereafter, warrant of arrest for deportation was issued, December 18, 1952. [R. 55-56.] After intervening proceedings not material here, petitioner, on July 24, 1953, filed petition in the District Court below for Habeas Corpus, challenging the validity of the said order for his deportation, and the administrative hearing, for denial of procedural due process of law, insufficiency of evidence, and for unconstitutionality in the deportation statute in providing for deportation of persons for mere membership *in se* in the Communist Party, by name, as a named organization. [R. 3-10.]

Upon Habeas Corpus it was conceded by the government that the place to which deportation was intended was South Korea [R. 13]; petitioner, as a Korean whose expressed views had often, and avowedly, been hostile to and critical of Syngman Rhee, and of the present South Korean government, claimed jeopardy of physical persecution, or of death, if deportation should be ordered to such country.* [R. 6-7.]

---

*A hearing was opened on this issue of physical persecution in the Administrative Agency during the period of this review proceeding. Petitioner introduced massive documentary material evidencing the jeopardy of physical persecution, or death, to any political opponent of Syngman Rhee who might be deported there. After hearing an administrative order staying temporarily deportation to South Korea (though not elsewhere) because of jeopardy of physical persecution was entered, and such stay is presently in operation. However, stay orders of this character, under the statutes are discretionary, and temporary only, and do not eliminate or quiet jeopardy since they are subject to recall with no certainty of right.

The District Court, after reviewing the record of the administrative proceedings, on August 21, 1953, sustained the order of deportation and denied the petition for Habeas Corpus. [R. 37-38.]

Petitioner duly appealed. [R. 39.]

The Court below, Court of Appeals for the Ninth Circuit, affirmed the judgment of the District Court, and sustained the validity of the deportation proceedings and of the order for deportation. [*Hyun v. Landon,* 219 F. 2d 404; R. 45-53.] Upon the subject of right of presence and the taking of the depositions in Hawaii, the Court below stated:

> "It is contended by appellant that the action of the Immigration Service in taking the depositions of Uesugi and Izuka in Honolulu, while he was in custody in California, deprived him of the essential ingredients of due process of law. The argument is that not only was Hyun in the custody of appellee at the time the depositions were taken but that he was financially unable to transport his counsel to Honolulu or to procure Honolulu counsel to represent him at the depositions. In view of the comparative financial resources of Hyun and the Government of the United States, and in further consideration of the plethora of government transportation between Hawaii and the west coast, it is appellant's contention that the government should have transported the witnesses to the west coast for the depositions, or in the alternative provided transportation to Hawaii for Hyun and his attorney. Failure to do either, it is alleged, deprived appellant of essential ingredients of due process of law. * * * This Court has repeatedly held that financial inability of an alien to insure attendance of himself or his attorney, or both, at

the place where depositions are being taken is not a denial of due process. As was stated in *Bhagat Singh v. McGrath*, 1939, 9 Cir., 104 F. 2d 122, 123: 'Deportation hearings are civil in nature and the alien need not be confronted by the witnesses; evidence may be obtained by deposition * * * We have heretofore decided that the fact that an alien is financially unable to travel to a place where he could cross-examine the witnesses, or send an attorney is not a denial of the right of cross-examination.'"

—[R. 47-48; 219 F. 2d at pp. 406-407].

Summary of Argument.

Petitioner urges that the conducting of his trial below without his *presence*, and by means of "depositions" conducted in Hawaii 2500 miles from place of trial, without presence by him at such proceedings and without agreement or waiver, in lieu of requiring production at the trial proceedings of all witnesses for purposes of direct and live presence, confrontation, and cross-examination, deprived petitioner of due process of law under the Fifth Amendment to the Constitution.

The right of presence, in proceedings affecting liberty or life, has been said by this Court to be *"fundamental"* to Constitutional hearing—"scarcely less important . . . than the right of trial itself."

Petitioner's proceedings were in deportation and placed in issue gravest jeopardies to liberty, and even to life. They affected an alien life-resident in the United States, married to a citizen wife, and the father of two minor citizen sons, and deportation was purposed to a country of destination, South Korea, bearing acknowledged jeopardy and risk even of physical persecution, or of death.

The depositions below were taken without compulsion of necessity, and were undertaken for convenience only. The witnesses affected were all living, in good health, and within the jurisdiction of the United States and answerable fully to Federal scope and power of process.

The depositions, when taken, were *ex parte*, and without presence by petitioner at their conduct. Petitioner was in custody at the time concerned, and throughout the whole of his proceedings, and control of his presence was in the Service's hands. He was not rendered present at the depositions, nor in advance of such even advised he could, by *any* course, be so; he was advised only that his *counsel* could be present, or that there could be submitted on his behalf written interrogatories for purposes of cross-examination. After the fact only—after the deposition proceedings were completed and had, petitioner was told that, had he "asked" so, he could have been privately transported to Hawaii, under security of guards, to have been present at the deposition taking, but this at his private expense and financing only, including transporting of guards, and hence an offer without availability to petitioner in any event, he being without means or financial capacity to invoke such.

The *ex parte* depositions affected not merely incidental or cumulative matters, but constituted the *sole* substantive evidence of alleged deportability. In consequence petitioner's trial was *total* trial *in absentia*. The naked right even to be present at one's hearing and judgment was denied. In consequence there were denied, as well, the included rights subsumed within, and incident to, right of presence, including right of confrontation, right of cross-examination, and right to assist and participate with, and be assisted by, counsel.

All of these fundamental rights, indispensable to fair hearing, were denied peremptorily, and totally, below upon rationale only that deportation proceedings are said to be *"civil"* in "character", and that in consequence process appropriate to property contests only, in purely private, civil causes, is sufficent there, and that none of the rights of confrontation, cross-examination or secured presence need be secured, and that depositions may be undertaken freely and without limitation. Said the Court below, simply: "Deportation hearings are civil in nature and the alien need not be confronted by the witnesses; evidence may be obtained by deposition."

The error here is *fundamental.* Due process of procedure, and the requirements of Constitutional fair trial, do not vary thus by the mere name and form of proceedings, as "civil" as separated from "criminal", but vary only with the *substance* of hearings and proceedings—with whether the proceedings affect matters of *property* rights only, and are private in nature of litigation, or affect matters of *liberty*, or *life*, and are public, and involuntary.

The Service, and the Court below, shortly stated, gave petitioner *property* process only, in a matter where the Constitution required liberty-life process, and secured, safeguarded fair trial. "Due process" requires safeguarded, fair process for matters affecting liberty and life, and requires, among other indispensable securities there, mandatory and secured *right of presence.*

The origin of this is the circumstance that *public interest*, as well as mere private concern, requires in matters affecting jeopardy of life, body or liberty, fairest and safeguarded hearing and judgment. Without such,

the judgment and condemnation of any single individual disquiets, and fundamentally, all of society.

That fair trial affecting liberty or life requires secured and mandatory right of presence is conceived in criminal causes self-evident—a basic and undeniable requirement of indispensable due process of law. It is protected there, and has been anciently, as a matter of judicial right, as well as under numerous and varied "criminal-right" statutory and constitutional provisions, both state and Federal. It is secured, as well, and *additionally and separately*, by requirement of *due process of law* under the *Federal Constitution*.

It is the latter circumstance which is invoked at bar. It is upon the rock-premise guarantee of right of presence in criminal trial affecting liberty or life by *due process* upon which petitioner builds. It is not as a criminal-right privilege, but as a *due process right of liberty fair trial* that petitioner premises right of secured presence in deportation causes affecting liberty and life, as at bar.

Not relevant or reached at bar, therefore, are the decisions or statements of this Court indicating that the strictly criminal-rights provisions of the Constitution, as the *ex post facto* clause, or the jury trial security, do not obtain in deportation. These do not gainsay that *due process* and procedural right of fair trial DO obtain there, and petitioner seeks right of presence, including right of confrontation, cross-examination, right to aid of and be aided by, counsel, and other included securities subsumed within presence, as a secured and mandatory right, *not* as deriving from, or upon analogy to, the security of such matters as provided in the criminal-rights provisions of the Sixth Amendment, but, in important

and critical difference, as securities of due process under the Fifth Amendment.

The rights secured by *due process* affecting liberty or life, if surveyed, evidence upon their face that all are related to, and crucial to, fair, safeguarded hearing. All the basic due process rights secured in criminal hearings, as right to freedom from violence or coercion in trial proceedings, right to judgment by an impartial judge free from purpose or self-interest to convict, right to notice of the charges laid, right to public trial, and right to facilities and time to subpoena or produce witnesses or evidence in fair defense—all are plain on their face in their direct relation to *fair, safeguarded trial.* Without safeguard of such minimal securities and rights where liberty or life may be forfeited, trials for crime would self-evidently violate "fundamental fairness."

So, too, with right of mandatory, secured presence of the accused. Judgment where life or liberty may be forfeited, if not had to the face of and in the presence of the accused, "shocks the conscience". Hence, where in a deportation cause, as at bar, consequences as serious as in a criminal cause with respect to jeopardy to liberty, or to life, are involved, right of secured presence of the accused, as the other minimal rights of fair trial under due process affecting liberty or life listed above, is guaranteed and made mandatory by the Fifth Amendment.

The requirements of due process of law in two areas outside deportation confirm and make evident that in non-criminal causes where liberty, limb or life are placed in jeopardy, like process to criminal fair process, in terms of minimum requirements of due process of law and fair hearing, are required by the Constitution. These areas are (1) insanity confinement proceedings, and (2)

asexualization proceedings. In both of these areas, principle and decided law make plain that mandatory, secured right of presence is an indispensable element to fair trial—and hence to due process—in such proceedings, as much as in directly criminal trials, notwithstanding that in both such cases the proceedings concededly are "civil" in name and form, and notwithstanding that the purpose of society in both such cases is curative, and not to punish.

It would as much shock conscience, and offend the requirements of the Constitution, to imprison a man as insane, or subject him to compulsory operation upon his body for sexual sterilization, where he contested and denied the facts laid against him as basis in either case so to act, in proceedings held without respect for mandatory, secured right of presence, as to imprison or punish him corporally, or take his life, in proceedings with like denial of right, for asserted "crime". Due process being a matter of *substance* prohibits such violation of individual security and right in all such stated cases, and equally.

By like matter of principle, and with like force, it prohibits such denial of right, as well, in deportation proceedings with consequences equally bearing jeopardy to liberty and life, as at bar.

It is to be noted, furthermore, at bar that particular circumstances especially aggravated the denial of fair trial in denial of right of presence: the denial was *total,* and the "depositions" taken without presence were the *sole* evidence offered on the issue of substantive deporta-

bility, and hence petitioner's trial, in substance, was *total trial in absentia;* also, identification by passport-photo, bearing name of the accused on its face, was substituted for right of confrontation, and formed the identification basis for all testimonial examination; the character of the examination was grossly leading and particularly required the restraint of right of presence; the denial of presence was *needless,* and for convenience and accommodation alone; the subject matter of the examination related in no instance to illegal act but only to speech and expression of opinion, and lay within the area guarded and reached by the First Amendment, and required thereby particular safeguard and restraint.

Finally, it is to be observed that the issues involved at bar rise far beyond the individual case of petitioner and present a fearsome precedent. A ruling is sought at bar by the government to so limit procedural rights in deportation as to permit taking of *ex parte* depositions far removed from the place of hearing and without provision for attendance by the alien or counsel, in any deportation proceedings at the pleasure of the government. If such a precedent be established the spectacle is presented of possible wholesale use of depositions, particularly in political deportations, with accusations made *ex parte,* and by informer-accomplice witnesses, without check or restraint whatever by confrontation or cross-examination.

ARGUMENT.

THESIS: DUE PROCESS OF LAW REQUIRED MANDATORY RIGHT OF PRESENCE OF THE ACCUSED (PETITIONER) AT THE DEPORTATION PROCEEDINGS BELOW.

Introduction.

The Court below, on thesis that deportation is "civil," and therefore that property process, sufficient for purely private, civil causes, was sufficient and fair enough there, and that right of confrontation or presence need not be observed and depositions might be freely and without restriction employed, approved proceedings violating one of the most basic securities of fair trial affecting liberty or life, the right of presence.

Petitioner attacks the "civil proceedings" rationale above stated of the Court below, and *fundamentally*. Petitioner attacks such, however, not on basis that deportation is to be technically classed as equateable to criminal proceedings, though that could be urged, and forcefully, but on basis, rather, that due *process* and *right of fair trial* are determined in content, and in requisites, not by form, but by *substance*—not by whether the proceedings are classed "civil" or "criminal" in name and characterization, but by whether the same affect merely property matters, in private, civil litigation, or affect matters of liberty or life in compulsory proceedings instituted by government acts. Life, and liberty (which is but a leasehold portion of life), in petitioner's thesis, is *superior* to property in human value, and basically, and is qualitatively separated therefrom in requirements of due process fair trial.

Petitioner's thesis builds, in important beginning, upon right of presence in meanest misdemeanor criminal trial.

The procedure accorded petitioner below would have been held to violate confrontation and right of Constitutional fair trial *out of hand,* had such occurred in criminal cause of whatever character, and particularly if, as at bar, affecting liberty and life. Petitioner was in custody by the Service throughout his hearings and he was not rendered present at the Hawaiian depositions. Only after the fact was he even advised he conceivably could have been present, had he "asked" so, and had he been able to offer and provide private transportation of himself, and of Service guards to secure him—an alternative petitioner was without means, in any event, to invoke. Such procedure would be disapproved *out of hand* as violative of Constitutional safeguard of fair trial and right of presence, in criminal cause. Resort to depositions, in lieu of production of live witnesses at the hearing, save in circumstances and situations of *necessity,* violates *fundamentally,* and as an *elementary and basic* circumstance, secured right of presence in criminal causes.

Mandatory right of presence of the accused, with right of confrontation, cross-examination, and of counsel, is secured in criminal causes as a matter both of common law and special "criminal-right" statutory and constitutional provisions, state and federal, and, *separately,* as a matter of *Constitutional due process of law.* It is upon premise and foundation based on the latter circumstance that petitioner builds.

It is not that petitioner seeks to equate deportation to criminal proceedings, as such, in thesis, but that *due process* equates all proceedings—criminal, deportation and whatever—affecting liberty and life, in requiring mandatory right of safeguarded, fair hearing, including *right of presence.*

Understanding of right of presence as a requirement of due process fair trial begins with security of right of presence as a due process right in criminal trials, because the origins and content of liberty-life due process fair hearing begin there, both in terms of history and of frequency of consideration and analysis. It will be found, as might be foreseen, that right of presence there is a right at once ancient, deeply-valued and many times secured and protected, both directly and indirectly, explicitly and implicitly, in sources additional to and separate from Federal requirement of due process. There will emerge, however, ultimate certainty, that separate from and independent from all other guarantees thereof, presence is required in any and every criminal cause, and particularly where affecting liberty or life, by *Federal due process of law*, because such right is *indispensable* to fair, safeguarded hearing.

It is by token of this indispensable relation of mandatory presence of the person affected to fair hearing and judgment, in proceedings wherein the liberty or life of such individual may be forfeit, and because only of this, that presence in such proceedings has been constituted a Constitutional prerequisite to due process fair trial. It is a matter of public concernment. Society cannot afford to be careless in matters affecting liberty or life. Hence, *as an interest of society* as much as of the individual, before heaviest blows, there must be fairest hearing.

By consequence of exactly parallel reasoning and principle, mandatory presence is equally required by due process of procedure in *deportation* proceedings, as at bar, bearing jeopardy to liberty and life. Moreover, in other non-criminal proceedings outside deportation affecting liberty, limb or life, there is corroboration that due

process fair hearing requires secured right of presence. Both in insanity confinement matters, and in asexualization-operation proceedings, right of presence is plainly a security of due process fair trial; by equal token it is required in deportation proceedings, as at bar, affecting liberty and life.

I.

The Right of Presence, Subsuming and Including Right to Confront and Be Confronted by All Witnesses and by One's Judges, Right of Free Cross-examination, Right to Aid and Be Aided by Counsel or to Act as One's Own Counsel, and Right to Observe and Particpate Fully in the Entirety of One's Proceedings, Is Basic Utterly in Criminal Trial in All Anglo-American Jurisdictions by History, by Principle, and by Constitutional, Statutory and Judicial Guarantee, and, Under the Federal Constitution, Is Included Within the Minimum Requirements of Fair Trial Secured Mandatorily by Due Process of Law.

Approved below is an order of deportation and exile for a man who has lived all the meaningful years of his life in the United States, with purpose presently by government to expel him forcibly from his home, his homeland, his work and his family, including citizen wife and two citizen children, and by deportation to subject him to a form of international outlawry and to jeopardy including even hazard of physical persecution or death—on a "trial" which could not have been undertaken in Federal jurisdiction or in any of the forty-eight states for the meanest misdeameanor punishable by five days in jail, or even by five dollars' fine, a "hearing" conducted in denial of the single right perhaps most basic to fair

judgment of all rights projected by right of trial at all—*the right of presence.*

In criminal causes mandatory, secured right of presence of the accused, throughout the whole of his trial, that he may be tried and judged openly, publicly and to his face, is conceived *not merely a right*, but a *public necessity* of fair trial, an indispensable requirement of fair and safeguarded judgment. In consequence, under every statute and constitution in every American jurisdiction, state, federal and territorial, in every period of our history, and at common law, it has universally been provided, explicitly and implicitly, that mandatory right of the presence of the accused at his trial shall be in absolute measure honored and secured. The right is particularly inviolate in *serious* criminal causes—felony causes, and crimes bearing corporal or capital punishment—but unless waived, or unless forfeited by act of misconduct, the secured right of presence is provided and guaranteed in all criminal trials and proceedings in whole.

> "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner."
>
> —*Lewis v. United States*, 146 U. S. 370, 372.

> "In the United States, almost all Constitutions have given a permanent sanction to the principle of Confrontation, by clauses requiring that in criminal cases, the accused shall be 'confronted with the witnesses against him' or 'brought face to face' with them."
>
> —Wigmore on Evidence, Vol. V, p. 127. (Collecting constitutional citations.)

> "The Constitutions of most of the United States, incorporating in this an old common law principle,

provide that the accused, in criminal cases, shall have a right to meet the witnesses against him face to face. Even where this is not a part of the fundamental law of the land, it is held obligatory by the courts."

—Wharton, "Criminal Pleadings and Practice" (9th Ed., 1889), p. 392.

"The testimony for the people in criminal cases can only . . . be given by witnesses who are present in court. The defendant is entitled [by Constitutional right] to be confronted with the witnesses against him; * * * [Moreover, in] cases of felony, where the prisoner's life or liberty is in peril, he has the right to be present, and must be present, during the whole of the trial, and until final judgment. If he be absent . . . there is a want of jurisdiction over the person, and the court cannot proceed with the trial, or receive the verdict, or pronounce the final judgment."

—Cooley, "Constitutional Limitations" (8th Ed.) Vol. I, pp. 662-667. (Collecting authorities.)

"In the absence of a permissible waiver, . . . under constitutional or statutory provisions to that effect and at common law, an accused charged with a felony is entitled to be present, and for a valid trial and conviction, must be present, at every stage of the trial, or at least when any important or substantive step is taken."

—23 C. J. S. pp. 303-304. (Collecting authorities.)

The right is many-sided—as well in purpose and safeguard as in origin and expression of its guaranty. Thus it derives in guaranty in part from the right of

confrontation, and it certainly includes and encompasses that right, including right to confront one's judges, as well as witnesses both favorable and opposed. It includes as well the right of cross-examination. It partakes and derives also in important measure from the guarantee of right of counsel, presence being integral to right to aid and be aided by one's counsel, or to act, on choice, as one's own representative. Also, it is in important part implicit in a guarantee of right to jury trial, or to trial by court, confrontation of and by the jury or court being an element implicitly assumed in such. It is a part, also, of right to a public hearing. Thus it is implicit in most of the specific rights secured under the Sixth Amendment to the Federal Constitution, and in the counterpart provisions to such in state constitutions; some state statutes and constitutions, additionally, make separate and explicit provision, in very terms for the right of an accused to "appear" and/or "be present." However, whether deriving protection from explicit or implicit statement, or both, the right is *universal* in security, and in the recognized worth of its safeguard.

> "To allay the apprehensions of the people lest the federal government invade their liberties, the first ten amendments to the Constitution were adopted. The Sixth assures one accused of crime that if prosecuted under federal law, he shall have a public trial, be informed of the nature and cause of the accusation, be confronted with the witnesses against him, and have the assistance of counsel for his defense. But the purpose that all trials, in state as well as national tribunals, should not lack the same quality of fairness, is evidenced by the embodiment of a guarantee of similar import in the constitution of every state in the union. Out of excess of caution,

the fundamental law of many of the States specifically safeguards the right of the accused, 'to appear and defend in person.' [Collecting constitutional citations.] [These] mere differences in phraseology have not obscured the fact that all these instruments were intended to secure the same great privilege—a fair hearing. Accordingly, the courts have uniformly and invariably held that the Sixth Amendment, as respects federal trials, and the analogous declarations of right of the state constitutions touching trials in state courts, secure to the accused the privilege of presence at every stage of his trial. This Court has so declared. In commenting upon the section of the Philippine Civil Government Act, which extends to the accused in all criminal prosecutions 'the right to be heard by himself and counsel,' this was said: 'An identical or similar provision is found in the constitutions of the several States and its substantial equivalent is embodied in the Sixth Amendment to the Constitution of the United States. . . . In cases of felony, our courts, with substantial accord, have regarded it . . . as being scarcely less important to the accused than the right of trial itself.'

"And, as if to make assurance doubly sure, the legislatures of many of the States have adopted statutes redundant to the constitutional mandate, explicitly declaring the right of the accused to be present at his trial. [Collecting statutory citations.]"

—*Snyder v. Massachusetts,* 291 U. S. 97, 129-131, Mr. Justice Roberts, dissenting on grounds not material here, Mr. Justice Brandeis, Sutherland and Butler, concurring.

In *Kirby v. United States,* 174 U. S. 47, 54-55, right of presence was attempted by statute to be circumvented in a prosecution affecting a charge of receipt of stolen

property. In a trial of the alleged receiver, a Federal statute attempted to make the prior conviction of the alleged primary thief record evidence (albeit not conclusive) of the fact of theft. Said this Court there:

> "The record of the conviction of the principals could not however be used to establish, against the alleged receiver, charged with the commission of another and substantive crime, the essential fact that the property alleged to have been feloniously received by him, was actually stolen from the United States. Kirby was not present when Wallace and Baxter confessed their crime by pleas of guilty, nor when King was proved to be guilty by witnesses who personally testified before the jury. Now was Kirby entitled of right to participate in the trial of the principal felons. * * * One of the fundamental guarantees of life and liberty is found in the Sixth Amendment of the Constitution of the United States, which provides that 'in all criminal prosecutions the accused shall . . . be confronted with the witnesses against him.' Instead of confronting Kirby with witnesses to establish the vital fact that the property alleged to have been received by him had been stolen from the United States, he was confronted only with the record of another criminal prosecution, with which he had no connection, and the evidence in which was not given in his presence. . . . [A] fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial of conduct of criminal cases."
>
> —*Kirby v. United States,* 174 U. S. 47, 54-55.

Commenting upon the significance and scope of a provision of the Philippine Civil Government Act, comparable to the Federal Sixth Amendment and securing right of confrontation and right "to be heard by himself and counsel," this Court in *Diaz v. United States,* 223 U. S. 442, 454-455, observed:

> "An identical or similar provision is found in the constitutions of the several States, and its substantial equivalent is embodied in the Sixth Amendment to the Constitution of the United States. . . . In cases of felony, our courts, with substantial accord, have regarded it [right of presence] as extending to every stage of the trial, inclusive of the impanelling of the jury and the reception of the verdict, and as being scarcely less important to the accused than the right of trial itself."
>
> —*Diaz v. United States, supra,* 223 U. S. at pp. 454-455.

Accord:

> "The personal presence of the accused, from the beginning to the end of a trial for felony, involving life or liberty, as well as at the time final judgment is rendered against him, may be, and must be assumed to be, vital to the proper conduct of his defense, and cannot be dispensed with. This court in *Hopt v. Utah,* 110 U. S. 574, 579 [observed] that the public has an interest in the life and liberty of the accused, and that neither can be lawfully taken except in the mode prescribed by law. . . ."
>
> —*Schwab v. Berggren,* 143 U. S. 442, 448.

> "[A] prisoner has no absolute right to argue his own appeal or even to be present . . . in an appellate court . . . The absence of [such] right is in sharp contrast to his constitutional prerogative

of being present in person at each significant stage of a felony prosecution, see *Hopt v. Utah*, 110 U. S. 574, and *Snyder v. Massachusetts*, 291 U. S. 97, and to his recognized privilege of conducting his own defense at the trial."

—*Price v. Jonhston*, 334 U. S. 266, 285.

Comparable declarations and expressions of the inviolable quality, and indispensable worth and value, of the right of presence of the accused in criminal causes, have been voiced by the state courts, as well, and since earliest recorded decisions. Witness the state declarations below:

"It is of the very essence of a criminal trial . . . that the accused shall be brought face to face with the witnesses against him [and] also with his triers."

—*Temple v. Commonwealth* (1879), 77 Ky. 769, 771.

"These great common-law requirements have been made constitutional provisions in the various states [and require, among other things, that] the accused must be present in court to meet the witnesses face to face . . . * * * These are great constitutional safeguards against oppression and injustice that must not be abridged or compromised. * * * [Presence] is . . . the indispensable right of the accused."

—*French v. State* (1893), 85 Wis. 400, 410-411, and at p. 409.

"It is fundamental in Anglo-Saxon jurisprudence that the defendant charged with a felony shall be permitted to be present at every stage of trial."

—*Commonwealth ex rel. Milewski v. Ashe* (1950), 363 Pa. 596, 601, 70 A. 2d 625.

In *State v. Hurlbut* (Conn. 1784), 1 Root 90, it is declared that a criminal trial without presence is "a nullity" because "[the] defendant must appear, or there will be no propriety in receiving the verdict."

In *Prine v. Commonwealth* (1851), 18 Pa. 103, 104, it is stated that to violate the right of presence in a criminal cause would be to violate "the dictates of humanity."

In *Andrews v. State* (Tenn., 1855), 2 Sneed 550, 553, it is declared requirement of presence in criminal trials is "founded in the justice and wisdom of the common law," and is "necessary to the full and free exercise of the right of the accused to make his defense."

Accord:

> "If it is shown that [a criminal defendant] was absent during the taking of any essential step in the trial, he cannot be said to have had a trial in due course of law."
>
> *Summeralls v. State* (1896), 37 Fla. 162, 164.

> "If there is anything fundamentally and well established in criminal procedure it is the right of an accused person, on a felony charge, to be present during all of the trial."
>
> —*State v. Chandler,* 128 Ore. 204, 208, 274 Pac. 303.

> "Out of abundant tenderness for the right secured to the accused by our constitution, to be confronted by the witnesses against him, and to be heard by himself or counsel, our court has . . . held that it must be shown by the record that the accused was present in court pending the trial. This is upon the ground of the peculiar sacredness of this high constitutional right."
>
> —*Dyson v. Mississippi* (1853), 26 Miss. 362, 383.

Also declaring the utterly fundamental character of mandatory, secured right of presence of an accused in criminal causes, see:

Ponzi v. Fessenden, 258 U. S. 254, 260;
Shields v. United States, 273 U. S. 583, 588-589;
Williams v. New York, 337 U. S. 241, 244-246;
Slocovitch v. State, 46 Ala. 227, 228;
Whittaker v. State, 173 Ark. 1172, 1178, 294 S. W. 397;
Holton v. State, 2 Fla. 476, 500-501;
Chance v. State, 156 Ga. 428, 430-433, 119 S. E. 303;
People v. Beck, 305 Ill. 593, 596-599, 137 N. E. 454;
Batchelor v. State, 189 Ind. 69, 76-78, 125 N. E. 773;
State v. Reidel, 26 Iowa 430, 436-438;
Riddle v. Commonwealth, 216 Ky. 220, 221-222, 287 S. W. 704;
State v. Hutchinson, 163 La. 146, 147-148, 111 So. 656;
Duffy v. State, 151 Md. 456, 472-477, 135 Atl. 189;
Frey v. Calhoun, 107 Mich. 130, 131, 64 N. W. 1047;
Foster v. State, 70 Miss. 755, 764-767, 12 So. 822;
State v. Hoffman, 78 Mo. 256, 258-260;
State v. Vanella, 40 Mont. 326, 333, 106 Pac. 364;
Miller v. State, 29 Neb. 437, 440-441, 45 N. W. 451;
People v. Perkins, 1 Wend. (N. Y.) 91, 92;
State v. Thomas, 64 N. C. 74, 75-77;
State v. Dixon, 185 N. C. 727, 729-730, 117 S. E. 170;

State v. Schasker, 60 N. D. 462, 464, 235 N. W. 345;

Cole v. State, 35 Okla. Cr. 50, 51-56, 248 Pac. 347;

Gray v. State, 158 Tenn. 370, 371-373, 13 S. W. 2d 793;

Brown v. State, 38 Tex. 483, 484;

Schafer v. State, 118 Tex. Cr. Rep. 500, 502-505, 40 S. W. 2d 147;

State v. Mannion, 19 Utah 505, 508-515, 57 Pac. 542;

Palmer v. Commonwealth, 143 Va. 592, 603-608, 130 S. E. 398;

State v. Shutzler, 82 Wash. 365-368, 144 Pac. 284;

State v. Howerton, 100 W. Va. 501, 502-504, 130 S. E. 655;

Wharton, "Criminal Pleading and Practice" (9th Ed. 1889), Ch. IX, "Presence of Defendant in Court";

Bishop, "New Criminal Procedure" (4th Ed.), Vol. I, Ch. XVIII, "The Presence of the Prisoner in Court";

23 C. J. S. 973;

Annotations, 100 A. L. R. 478-487, 6 A. L. R. 2d 997-1002;

Rule 43, Federal Rules of Criminal Procedure;

Note to Rule 45, Preliminary Draft of Federal Rules of Criminal Procedure (1943), (Collecting authorities);

Barron & Holtzoff, "Federal Practice and Procedure" (Rules Ed., 1951), Vol. IV, pp. 394-395;

Cyclopedia of Federal Procedure (3d Ed.), Vol. XI, Sec. 39.79 and Sec. 43.01, n. 3.

Whitman, "Federal Criminal Procedure" (1950), Sec. 43.3, p. 348;

Orfield, "Criminal Procedure From Arrest to Appeal" (1947), pp. 413-417;

Note (1955), 12 Wash. and Lee L. Rev. 230-238;

Note (1949), 23 Temple L. Q. 151-153;

Note (1950), 28 N. Car. L. Rev. 205-215.

The right derives from origins deep in the history of the common law. Thus:

Blackstone:

". . . process must issue to bring him into court; for the indictment cannot be tried unless he personally appears: According to the rules of equity in all cases, and the express provision of Statute 28, Edward III, c. 3 (Right of Trial, 1354), in capital ones, that no man shall be put to death without being brought to answer by due process of law."

—4 Blackstone, "Commentaries" (1769) *318.

Coke:

"But in criminall [*sic*] cases of life or member, the jury can give no privy verdict, but they must give it openly in court."

—2 Coke on Littleton, 227b.

Hale:

"In a case of felony or treason the verdict must be given in open court, and no privy verdict can be given. * * * [Further, in] capital causes, whether upon indictment or appeal, no verdict can be given by default in the absence of the party."

—2 Hale, "Pleas of the Crown" pp. 300, 298.

In *Rex v. Ladsingham,* Sir T. Raym., 193, 83 Eng. Rep. 101, it is recorded, "[No] privy verdict can be given in criminal cases which concern life, as felony, because the jury are commanded to look upon the prisoner when they give their verdict, and so the prisoner is to be there, present at the same time; . . ." In *Rex v. Ledgingham,* 1 Ventris 97, 86 Eng. Rep. 67, the law is stated: "In an information against him for the King, the Court took a privy verdict, and so it was said was the usual course at the assizes. But it cannot be so in cases of felony and treason, as it said in the 1 Inst. 227b."

Upon these authorities, Bacon summarized the law:

> "[It] is laid down, that a privy verdict cannot be given in a case of felonies; because the jury are directed, and ought, in such a case, to look upon the prisoner when they give their verdict."
>
> —Bacon, "A New Abridgement of the Law" (5th Ed., Corrected), Vol. VII, p. 3.

See also, expressing and confirming right of presence, at even earliest common law:

Rex v. Vipont (1761), 2 Burr 1163, 97 Eng. Rep. 767-769;

Rex v. Aikin (1765), 3 Burr 1785, 97 Eng. Rep. 1098, 1099;

Rex v. Crowther (1786), 1 T. R. 125, 127, 99 Eng. Rep. 1009-1011;

Rex v. Baker (1745), 2 Strange 1239, 93 Eng. Rep. 1156;

Rex v. Niccolls (1745), 2 Strange 1227, 93 Eng. Rep. 1148;

Rex v. Legingham (1670), 2 Keble 687, 84 Eng. Rep. 432;

Rex v. Harris and Duke (1689), 1 Ld. Raym. 267, 482, 91 Eng. Rep. 1075, 1221;

Regina v. Templeman (1700), 1 Salk 56, 91 Eng. Rep. 54;

Rex v. Hayes (1730), 2 Strange 843, 93 Eng. Rep. 888.

Accord:

Ball v. United States, 140 U. S. 118, 129-131;

Wharton, "Criminal Pleading and Practice" (9th Ed.), p. 392.

Historically mandatory right of presence of the accused in criminal causes arose in earliest common law periods because a *necessity* simultaneously both of *trial* and of a *defense.* In the forms and concepts of trial then obtaining—battle, ordeal and compurgation—presence was indispensable both to right of defense and to conduct of trial at all. Thus, in trial by battle, without presence of the accused there could be no battle, and, therefore, no trial; neither could there be for the defendant the means for acquittal or release. So, too, with trial by ordeal. Without presence of the accused to undergo before God ordeal by water or iron, there could be there no trial; neither could there be the means for vindication. Similarly with trial by compurgation. Both for trial and defense there presence of the accused was required, that he might participate. (Stephen, "A History of the Criminal Law of England" (1833), Vol. I, Chs. VIII and IX, and especially pp. 244, 246, 254 and 73; Pollock and Maitland, "A History of the English Law" (2nd Ed.), Vol. II, pp. 598-603; Note (1916), 16 Col. L. Rev. 18-36; Note (1955), 12 W. & L. L. Rev. 230-238; Orfield, "Criminal Procedure from Arrest to Appeal" (1947), pp. 345-346.)

Similarly, in the earliest employments at common law of trial by jury, the accused's "consent" to the jury was conceived indispensable, and without it neither trial nor conviction could be had. Hence presence of the accused was indispensable either that he might declare his consent or that he might be subjected to coercion and torture, particularly *"peine forte et dure,"* purposed to force his consent if withheld. (Stephen, *supra,* at p. 299.) Further, even when jury trials were accepted of course, until comparatively recent years, the accused in criminal trials in English common law was secured no right of counsel, and no right against self-incrimination, and his own examination was the central point of his criminal hearing; hence his presence was mandatory in law for his trial as well as for his opportunity of defense. (Stephen, *supra,* at p. 440; Orfield, *supra,* at pp. 349-351.)

However, with the transformation of mode of trial from ordeal, battle and compurgation, to jury trial of right and course ("by the country"), and with the development of the latter from early to modern content, the requirement of presence became secured ultimately as a matter of dignity and right, as an indispensable element in a fair hearing. With the development of English law to award the defendant all the present day rights of trial, including right to public hearing, right to counsel, immunity against self-incrimination, and right to confrontation and cross-examination, and with the development of the rules excluding hearsay evidence and confining the role of witnesses to the relation of facts known by sight or hearing, the right of presence of the accused at trial in criminal proceedings assumed its ultimate and present quality as an *indispensable safeguard and security of fair hearing*—in proceedings predicated upon *evidence*

and conducted under and pursuant to *law*. Thus, Stephen, describing the ultimate right of presence of an accused in modern English law, states the right as follows:

> "The prisoner has a right to be present at the trial . . . [Even if he grossly and violently misconducts himself] it is obvious that in capital cases, or indeed, in any trial involving severe punishment, almost any measures, short of removing [him], should be resorted to."
>
> —Stephen, "A Digest of the law of Criminal Procedure" (1883), Art. 302.

Accord:

Orfield, "Criminal Procedure from Arrest to Appeal," *supra*, pp. 346 *et seq.*

Respecting the ancient common law origins of the right of presence, the New York Court of Appeals has declared:

> "The requirement . . . that the defendant be present in person during a trial for a felony, is of ancient origin. Its origin is to be found in the necessity for the presence of the defendant when criminal guilt was determined by ordeal or by battle. . . . When these methods of trial were abandoned, the presence of the defendant was still necessary. Until comparatively recent times, a defendant in a criminal case was not allowed to be represented by counsel. III Blackstone's Commentaries, c. 25; *Powell v. State of Alabama*, 287 U. S. 45, 60. Although the defendant now is entitled to be represented by counsel, the requirement that the defendant must be present has persisted and is to be found in the statutes or Constitutions of many [actually, of all] of the States."
>
> —*People v. La Barbera* (1937), 274 N. Y. 339, 343, 8 N. E. 2d 884.

Noting origins antecedent even to the common law, the Pennsylvania Supreme Court in *Commonwealth ex rel. Milewski v. Ashe* (1950), 363 Pa. 596, 602-603, 70 A. 2d 625, quoted with approval the whole of the excerpt from *People v. La Barbera* above set forth and added:

> "It [right of presence at the time of sentence] goes back even beyond the common law. Mendelsohn in his book, 'The Criminal Jurisprudence of the Ancient Hebrews,' says in Section 111: 'When the verdict is arrived at, the accused is brought before the bar, and the chief of court declares it. . . .'"

Due Process of Law.

Presence of the accused is, then, a right, ancient, valued, and protected in criminal law, a right declared by this Court to be "scarcely less important to the accused than the right of trial itself." (*Diaz v. United States,* 223 U. S. 442, 455.) A right to trial at all "implies that [the accused] shall have a right to be present." (*Schwab v. Berggren,* 143 U. S. 442, 450.)

Moreover, it is a right secured by *the Federal guarantee of due process of law.*

Wherever and however else it may also be expressed and protected, as in the Federal Sixth Amendment, and state statutory and constitutional counterparts thereto, securing right to trial, to public hearing, to advisement of the charges laid, to counsel, to process, to be confronted by the witnesses and to cross-examine such, and sometimes in very words to "appear" or "be present," the minimal right of an accused in criminal causes to *secured and mandatory right of presence* is protected, absolutely and beyond power of diminution or change, by the Fed-

eral Constitutional guarantee of *due process of law* expressed in the Fifth and Fourteenth Amendments.

That is, presence when tried and judged in criminal causes is a right required not only by state and Federal provisions affecting strictly criminal trials as such, as the Federal Sixth Amendment and the state counterparts, but is, as well, a mandatory requirement of procedural due process of law. By principle, historical import, and by express determination of this Court, right of presence, is—as to criminal causes—a part of those minimal rights of fair hearing secured absolutely by the ultimate boundaries of civilized law "which no member of the Union may disregard . . ." (*Holden v. Hardy,* 169 U. S. 366, 389.)

This determination reaches back to the earliest decisions of this Court treating of right of presence, beginning with the historic decision in *Hopt v. Utah.*

Because no state has ever undertaken to directly deny or repudiate—or even attempted so to do—right of presence in a criminal cause in its core, and its substance, no ruling upon the right, under due process, has been direct. Involved only have been restrictions upon matters affecting the right but indirectly, or in peripheral manner, such as right to be present at such side matters and proceedings as appellate arguments after conviction, or mere passive views by trial court or jury of a geographical site only. Denials of these indirect and peripheral matters have been held, with serious divisions, not to violate alone due process of law.

But that due process secures and guarantees *in substance* right of presence, in its core, has never been disputed or challenged as a matter of established Constitutional law.

In *Hopt v. Utah,* 110 U. S. 574, 579, in earliest beginning, this Court, in addition to holding that right of presence in a criminal trial was secured and protected by a Utah Territorial statute applicable in the proceedings there involved, stated, as well:

> "If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."
>
> —*Hopt v. Utah, supra,* 110 U. S. at p. 579.

In *Dowdell v. United States,* 221 U. S. 325, at page 331, this Court said of the decision in *Hopt v. Utah:*

> "In *Hopt v. Utah,* 110 U. S. 574, this court held that due process of law required the accused to be present at every stage of the trial."

In *Schwab v. Berggren,* 143 U. S. 442, there was involved a denial by a state of right in a criminal defendant to attend appellate argument and proceedings *after conviction.* It was held right of presence under due process did not extend beyond trial conviction and judgment. Said this Court there, nonetheless:

> "The personal presence of the accused, from the beginning to the end of the trial for felony, involving life or liberty, as well as at the time final judgment is rendered against him, may be, and must be assumed to be, vital to the proper conduct of his defense, and cannot be dispensed with. * * * 'If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution.' "
>
> —*Schwab v. Berggren, supra,* 143 U. S. at pp. 448-449.

In *Valdez v. United States,* 244 U. S. 432, a claim under due process for denial of right of presence again was

entertained. It was determined there, however, after hearing, that the right, in the circumstances of the case, had been waived, and, alternatively, that in any event the right under due process did not include in its scope the act of a passive view by the trial court of a geographical site, without the taking of testimony or the conducting of any proceedings at such place. It is to be observed that there even the Solicitor General, on behalf of the United States, agreed and conceded, in argument and brief, that the right of presence was secured and protected by due process (under the Fifth Amendment); the Government urged only that the right should not be conceived equated, as well, to the right to counsel under the Sixth Amendment. Said the Government in argument there (244 U. S. at pp. 436-437):

> "The right of a defendant in a criminal case to be present at all stages of the trial . . . is a right which had long been secured to him at common law before the right to have counsel was granted to him and, therefore, is clearly not derived from the Sixth Amendment to the Constitution. Its derivation [is] from the early English common law [and, in America, and in Constitutional terms] from the 'due process' clause contained in the Fifth Amendment to the Constitution."
>
> —244 U. S. at pp. 436-437.

In *West v. Louisiana,* 194 U. S. 258, a ruling of a state court in a criminal cause permitting use of a deposition of a witness permanently outside the state boundaries, and beyond reach or power of process, was held not to offend due process, because predicated upon *necessity*—to wit, the impossibility of compelling appearance of the

witness—and because, in such premises, comparable in all respects to the ancient common law exceptions to right of presence permitting the use of depositions of witnesses who by the time of trial had become deceased or insane. Said this Court there, "The extension is not of such a fundamental character as to deprive the accused of due process of law." (194 U. S. at p. 263.)

Of similar significance see:

Howard v. Kentucky, 200 U. S. 164, 173-176;

Frank v. Mangum, 237 U. S. 309, 343-345;

Gaines v. Washington, 277 U. S. 81, 87.

Finally, in *Snyder v. Massachusetts,* 291 U. S. 97, this Court, while again reaffirming the decision in *Valdez v. United States, supra,* that right of presence does not extend to right to attend a mere passive view, stated in definitive manner, after lengthy review of the authorities, and of the scope and purpose of due process of law:

> "[Under] the Fourteenth Amendment . . ., the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by . . . absence . . . [Presence is indispensable to fair trial, when and to the extent that it] satisfies the test . . . basic and decisive, [that] it bears, or may fairly be assumed to bear, a relation, reasonably substantial, to . . . opportunity to defend. [To such extent it is a part of] the fundamental justice assured . . . by the Constitution of the United States."
>
> —*Snyder v. Massachusetts, supra,* 291 U. S. at pp. 107-108 and at p. 106, and again, at p. 108.

See also, subsequent to *Snyder v. Massachusetts,* and approving it:

Williams v. New York, 337 U. S. 241, 246;
Price v. Johnston, 334 U. S. 266, 285;
Johnson v. United States, 318 U. S. 189, 201.

Thus while no state has ever undertaken to deny or repudiate, in any substantive part, the mandatory, secured right of presence of an accused in any criminal cause, and hence no ruling upon the right under due process has been direct, the principle that Federal due process of law under the Fifth and Fourteenth Amendments, secures and protects in criminal causes the substance and core of right of presence is established Constitutional law, and never has this been disputed. That is, so basic is right of presence to fair accusation and trial in criminal causes that it is conceded it is basic, as well, to *due process,* and indispensable to Constitutional trial and judgment.

Depositions.

If, then, right of presence is basic to due process under the Constitution, and to fairness, in criminal causes, nothing is more plain than that that fundamental right so secured, probihits resort to "depositions," in the place of live, produced witnesses—except in rarest instances of *necessity,* bottomed upon impossibility of producing the affected witness live. That, indeed, is *fundamental to,* and a part of the *very purpose of,* the *right in its core.*

> "The primary object of the constitutional provision [securing right of presence and confrontation] was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the

accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand, and the manner in which he gives his testimony, whether he is worthy of belief. [In the case of a deceased witness, the prior deposition of such witness may be used, but this is only by force of] the necessities of the case. * * * [Such depositions] are admitted not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice."

—*Mattox v. United States,* 156 U. S. 237, 242-244.

"This provision [right of presence] . . . intends to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witness as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination. It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of . . . cross-examination."

—*Dowdell v. United States,* 221 U. S. 325, 330.

"It is scarcely necessary to say that to the rule that an accused is entitled to be confronted with witnesses against him, the admission of dying declarations is [merely] an exception which arises from the necessity of the case."

—*Kirby v. United States,* 174 U. S. 47, 61.

The use of depositions at pleasure, or for convenience only, as undertaken below, is inconsistent *utterly* with

the right of presence of a criminal accused. *Necessity* and *impossibility alone* can privilege use of depositions in the face of that fundamental command of fair criminal trial. (*Motes v. United States*, 178 U. S. 458; *Mattox v. United States, supra; Dowdell v. United States, supra; Kirby v. United States, supra.*)

> "The testimony for the people in criminal cases can only . . . be given by witnesses who are present in court. The defendant is entitled to be confronted with the witnesses against him; and if any of them be absent from the Commonwealth, so that their attendance cannot be compelled, or if they be dead, or have become incapacitated to give evidence, there is no mode by which their statements . . . can be used for his conviction. The exceptions to this rule are of cases which are excluded from its reasons by their peculiar circumstances; but they are far from numerous. If the witness was sworn before the examining magistrate, or before a coroner, and the accused had an opportunity then to cross-examine him, or if there were a former trial on which he was sworn, it seems allowable to make use of his deposition, or of the minutes of his examination, if the witness has since deceased, or has left the State, or is insane, or sick and unable to testify, or has been summoned but appears to have been kept away by the opposite party. So, also, if a person is on trial for homicide, the declarations of the party whom he is charged with having killed, if made under the solemnity of a conviction that he was at the point of death, and relating to matters of fact concerning the homicide, which passed under his own observation, may be given in evidence against the accused . . ."
>
> —Cooley, "Constitutional Limitations" (8th Ed.), Vol. I, pp. 664-667.

In *Motes v. United States,* 178 U. S. 458, a deposition was admitted in a criminal trial of a witness who had departed from the jurisdiction of trial by negligence of the prosecuting officers. This Court, in reversing the conviction for violation of the right of presence and of confrontation, said:

> "We are of the opinion that the admission in evidence of Taylor's statement or deposition, taken at the examining trial, was in violation of the constitutional right of the defendants to be confronted with the witnesses against them. It did not appear that Taylor was absent from the trial by the suggestion, procurement or act of the accused. On the contrary, his absence was manifestly due to the negligence of the officers of the Government. * * * In the present case there was not the slightest ground in the evidence to suppose that Taylor had absented himself from the trial at the instance, by the procurement or with the assent of either of the accused. Nor (if that were material) did his disappearance occur so long prior to his being called as a witness as to justify the conclusion that he had gone out of the State and was permanently beyond the jurisdiction of the Court. His absence, as already said, was plainly to be attributed to the negligence of the prosecution. The case is not within any of the recognized exceptions to the general rule prescribed in the Constitution. . . . We are unwilling to hold it to be consistent with the Constitutional requirement that an accused shall be confronted with witnesses against him, to permit the deposition or statement of an absent witness (taken at an examining trial) to be read at the final trial when it does not appear that the witness was absent by the suggestion, connivance or procurement of the accused, but does appear that

his absence was due to the negligence of the prosecution."

—*Motes v. United States, supra,* 178 U. S. at pp. 471-474.

Wigmore develops in detail that "necessity" and *only* such, will justify, in criminal causes, "dispens[ing] with the witness's personal presence for testifying," and says, respecting live and available witnesses as at bar, "No one has ever doubted that the *former testimony* of a witness cannot be used if the witness is *still available* for the purpose of testifying at the present trial." (Wigmore on Evidence (3d Ed.), Vol. V, pp. 146 and 191. Emphasis in original.)

Accord, as to the rule at common law, see:

Rex v. Crowther (1786), 1 T. R. 125, 127, 99 Eng. Rep. 1009, 1009-1011;

Rex v. Vipont (1761), 2 Burr 1163, 97 Eng. Rep. 767-769.

Had the instant case, then, been a trial for meanest misdemeanor, and certainly if for serious offense, the proceedings had below of *ex parte* trial—trial by "depositions," without the presence of petitioner at the substance of the hearing—would have been illegal, and, would have violated Constitutional due process of law and the requirements of *fair trial.*

II.

As in Criminal Causes, Due Process of Law Requires in Deportation Proceedings as at Bar Mandatory, Secured Right of Presence of the Accused.

If, as seen above, mandatory, secured right of presence is a precondition of due process in serious criminal causes because deemed indispensable there to security of fair trial and judgment, it is equally a requirement of due process in deportation proceedings of comparable quality and seriousness, as at bar. Identical considerations of Constitutional principle, and of public concernment for security of fair hearing, apply in each instance, and the differences in deportation in the name and formal purpose of society's act are without consequence upon the single and only issue—the need for, and the fair prerequisites, of safeguarded, secured *fair trial.*

The presence of the accused is required by due process in criminal causes because fair and accurate—and only such—application of society's criminal laws is a *public* requirement, not merely an individual interest. Fair judgment of others is sought by every member of society lest example be set or machinery created for unfair judgment of himself. Not magnanimity or generosity, but fear and self-interest lie at the requirement's roots. It is but a plain application of doing unto others as one would have only be done unto him.

Presence of the accused is a *central element* in the machinery of due process to achieve this purpose. No other single right affords society as great a measure of safeguard and security against miscarriage of, or malice in, the administration of justice as does the right of presence, the requirement that society's judgment be open, public, and to the face of the accused. Judgment with-

out such restraint is disquieting deeply, and opposed to public interest.

Indeed, so fundamentally is this so, that serious conflict has long existed whether, regardless of the rule as to lesser rights, the security of fair trial protected by the right of presence is a matter which can lie within the power of the individual, even by voluntary act, to waive. The historic statement of this Court in *Hopt v. Utah*, 110 U. S. 574, opposing power of waiver, strongly expresses the *deep public concernment* in the right of presence:

> "We are of the opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view, as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority.' I Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty, cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind. 4 Bl. Com.

11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

—*Hopt v. Utah, supra,* 110 U. S. at p. 579.

Quoted in full and approved in:

Schwab v. Berggren, 143 U. S. 442, 448-449;
Lewis v. United States, 146 U. S. 370, 374.

It is not important here that the portions of the excerpt from *Hopt v. Utah, supra,* relating to waiver, may now be in part reconsidered. (See *Patton v. United States,* 281 U. S. 276; *Adams v. McCann,* 317 U. S. 269.) Undiminished by any relaxation of law as to the breadth of right of waiver—which is in no way involved or reached in the proceedings at bar—is the deep condition of public interest expressed in *Hopt v. Utah* respecting full and inviolate security for the right of presence, as a safeguard of fair trial.

"The [rights of fair hearing] are not legal formalisms. . . . The *public conscience* must be satisfied that fairness dominates the administration of justice." (Emphasis added.)

—*Adams v. McCann,* 317 U. S. 269, 279.

The short of it is presence of the accused is affected deeply with public interest, and is of concern to "the pub-

lic conscience," because of its indispensable relation to *assuring fair hearing.*

It is by force of exactly this same relation that it is incorporated as a requirement of due process of law. In procedural areas, fair trial, and the machinery indispensable to *assuring* such, is the crux and *core* of due process.

The same purpose of fair hearing, and the same minimum Constitutional guarantee of procedural due process of law,* attend Federal deportation proceedings serious in quality as attend state criminal proceedings of like quality. The specific criminal-trial rights, *as such,* of the Fourth, Fifth and Sixth Amendments are not invokable in either such proceedings; only the minimums of justice secured by due process obtain. These, as will be seen, are extremely *few,* and are *basic utterly* to *fair trial;* in consequence they are as indispensable in the one class of proceedings as in the other, and for the same considerations and upon the same principles.

Thus, treating first of due process as a requirement in state criminal proceedings, petitioner does not urge here that due process as to state criminal causes makes applicable or subsumes the specific rights of criminal procedure secured in Federal criminal trials by the Fourth, Fifth and Sixth Amendments.* What are secured are not

---

*In terms of Federal Constitutional right.

*This does not mean that forceful plea may not be made for broader construction of due process, either free from the limits here stated, or, as including all of the procedural limitations of the specific provisions in the Federal Bill of Rights, and as such; such positions have been most forcefully made, and have been accepted by a strong minority of this Court, in whole or part. However, the argument line of the brief herein makes it unnecessary to reach all or any of these issues or distinctions; the minimum positions assumed and stated in the text herein is here sufficient.

criminal rights, as such, upon analogy to or derivation from the Federal criminal-rights Amendments, but *due process rights* which, as to procedure, derive in source from the requirements of *fair trial and judgment*, and from the ultimate values of civilization and human dignity.

Thus, petitioner does not here dispute but that under *due process*, in state criminal causes, right to jury trial is *not* secured (*Maxwell v. Dow*, 176 U. S. 581; *Walker v. Sauvinet*, 92 U. S. 90), right to grand jury indictment is *not* secured (*Hurtado v. California*, 110 U. S. 516; *Gaines v. Washington*, 277 U. S. 81, 86), and right to immunity against self-incrimination is *not* secured. (*Twining v. New Jersey*, 211 U. S. 78; *Adamson v. California*, 332 U. S. 46.) Consistent with due process these may be abandoned, this Court has stated, because, "[Respecting them, it cannot be] maintain[ed] that a fair and enlightened system of justice would be impossible without them. . . . [They] might be lost, and justice still be done." (*Palko v. Connecticut*, 302 U. S. 319, 325.)

What *is* secured is the structure of trial "fundamental" to the substance of a "hearing" (*Powell v. Alabama*, 287 U. S. 45, 67-68), the rights required by "fundamental fairness" (*Lisenba v. California*, 314 U. S. 219, 236; *Gibbs v. Burke*, 337 U. S. 773, 781; *Betts v. Brady*, 316 U. S. 455, 473) and "essential to a fair hearing" (*De Meerleer v. Michigan*, 329 U. S. 663, 665; *Foster v. Illinois*, 332 U. S. 134, 139), the safeguards indispensable to "fair trial." (*Powell v. Alabama, supra*, 287 U. S. 45, 52; *Adamson v. California*, 332 U. S. 46, 53; *Lyons v. Oklahoma*, 322 U. S. 596, 605.)

> "It [is] the duty of the court having [criminal] cases in charge to see that [the accused are] denied no necessary incident of a fair trial. [If a state

acts otherwise it] infringes the due process clause of the Fourteenth Amendment."

—*Powell v. Alabama,* 287 U. S. 45, 52.

"Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent . . . [We] apply the Due Process Clause to its historic function [in] assuring appropriate procedure before liberty is curtailed or life is taken."

—*Watts v. Indiana,* 338 U. S. 49, 54-55.

"A right to a fair trial is a right admittedly protected by the due process clause of the Fourteenth Amendment."

—*Adamson v. California,* 332 U. S. 46, 53.

A survey of the *specifics* of the rights held by this Court to be mandatory by due process, and secured against violation, in state criminal proceedings, demonstrates at once the narrow, yet *crucial,* function of due process in preserving the *machinery of fair trial.* Thus, included within the irreducible requirements of the due process guarantee, are the following:

—Right to trial in a tribunal uncoerced by mob intimidation.

Moore v. Dempsey, 261 U. S. 86;
Frank v. Mangum, 237 U. S. 309.

—Right to trial by an impartial judge, unmarked by self-interest to convict.

Tumey v. Ohio, 273 U. S. 510.

—Right to trial by an impartial jury, representatively selected, and without discrimination, if a jury be had.

Hernandez v. Texas, 347 U. S. 475, 477;
Smith v. Texas, 311 U. S. 128, 130;
Glasser v. United States, 315 U. S. 60, 86.

—Right to public trial, and to immunity from trial *in camera.*

In re Oliver, 333 U. S. 257.

—Right to be advised of the charges laid, and right not to be convicted upon charges not thus declared.

Smith v. O'Grady, 312 U. S. 329, 334;
De Jonge v. Oregon, 299 U. S. 353, 362;
Powell v. Alabama, 287 U. S. 45, 68.

—Right to facilities for and time to subpoena or produce witnesses and evidence in defense.

Adams v. McCann, 317 U. S. 269, 279.

—Right to be represented by counsel of choice, or to act as own counsel, or, in capital cases, or where fair hearing requires, to have counsel appointed if the accused be unrepresented and unable fairly to represent himself.

Powell v. Alabama, 287 U. S. 45;
De Meerleer v. Michigan, 329 U. S. 663;
Uveges v. Pennsylvania, 335 U. S. 437;
Gibbs v. Burke, 337 U. S. 773.

—Right not to be convicted upon perjured testimony, knowingly suborned by the state.

Mooney v. Holohan, 294 U. S. 103;
Hawk v. Olson, 326 U. S. 271, 275.

—Right not to be convicted upon a confession or plea extorted by force or coercion, either mental or phy-

sical, or obtained by trick, fraud or false promise by the state.

Chambers v. Florida, 309 U. S. 227;
Leyra v. Denno, 347 U. S. 556;
Waley v. Johnston, 316 U. S. 101;
Ashcraft v. Tennessee, 322 U. S. 143.

—Right not to be put under violence in governmental process, nor to be subjected to cruel or inhuman punishment, nor to be twice punished for the same offense.

Rochin v. California, 342 U. S. 165;
Francis v. Resweber, 329 U. S. 459.

It will be seen, thus, that the requirements of due process affecting the conduct of state criminal trials, are, in every instance requirements *related indispensably to fair trial and judgment.* It will be evident, also, why mandatory and secured right of *presence* of the accused in criminal causes likewise is incorporated in the due process minimums. It, too, and in measure and manner identical to the other due process commands, is indispensable in function and in safeguard to fair judgment and trial.

So basic are these minimal rights of due process that on statement of their terms they are, in reality, self-establishing and self-sustaining. Thus, that violence and coercion cannot be due process is plain on merest assertion. So, too, that a trial by a self-interested judge is not, and cannot be, a fair trial. Equally, is it plain, that "trial" *in camera* is no true trial at all, and particularly so as to matters touching liberty or life.

"Certain safe-guards are essential to criminal justice. The court must be uncoerced, *Moore v. Dempsey,* 261 U. S. 86, and it must have no interest other

than the pursuit of justice, *Tumey v. Ohio,* 273 U. S. 510."

—*Adams v. McCann,* 317 U. S. 269, 275.

"[There must be] a charge fairly made and fairly tried in a public tribunal."

—*In re Oliver,* 333 U. S. 257, 278.

Not every state act is a due process act. It could not be suggested that the states might lawfully recreate "trial by ordeal" (*Brown v. Mississippi,* 297 U. S. 278, 285), nor determine criminal guilt "[by] an *ex parte* proceeding." (*Powell v. Alabama, supra,* 287 U. S. 45, 72.) There must be "a . . . trial," and in civilized terms. (*Powell v. Alabama, supra,* 287 U. S. at p. 52.)

In precisely kindred manner is right of presence of the accused *integral to fair criminal hearing.* Presence is the *natural,* and best, safeguard devisable against either malice or error in judgment, and the best guaranty of fair and full defense, both to individual and society, which can be had. It is inseparable from safeguarded hearing. It is, in this Court's short summarization, "[a necessary constituent requirement of] the fundamental justice assured . . . by the Constitution . . ." (*Snyder v. Massachusetts, supra,* 291 U. S. 97, 108), a right "scarcely less important to the accused than the right of trial itself." (*Diaz v. United States,* 223 U. S. 442, 455.)

But, if this be so, presence is a component of due process and of the "fundamental justice assured by the Constitution" as to *deportation proceedings* serious in quality, as at bar, *equally as in criminal inquiries.* In serious deportation causes—as at bar—placed in hazard for the affected individual is jeopardy of *banishment* for life,

with separation from family and homeland—perhaps after a lifetime of residence in the United States—with loss of "all that makes life worth living." (*Ng Fung Ho v. White,* 259 U. S. 276, 284.) Hence if it is *consequence* that makes *safeguarded* hearing required by due process, and under the standards of civilized, voluntary society, then like protected hearing is required in deportation causes as serious in quality as criminal hearings, notwithstanding the "form" or name to each assigned. The compelling individual and social *need* for fair judgment, and the issue of the requirements and machinery necessary to assure such, are in both cases *identical.*

There can be no question but that due process of procedural law *applies in* deportation causes, and particularly as to proceedings affecting long resident, lawfully admitted persons, as at bar. As to deportation proceedings in such premises, this Court, as long ago as *Yamataya v. Fisher* (1902), 189 U. S. 86, 100, declared:

> "[T]his court has never held, nor must we now be understood as holding, that administrative officers when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution."
>
> —*Yamataya v. Fisher, supra,* 189 U. S. at p. 100.

Ever since that landmark declaration, it has been settled law, that, whatever may be the rule as to power of exclusion (*cf. Shaughnessy v. Mezei,* 345 U. S. 206; *Knauff v. Shaughnessy,* 338 U. S. 537; *cf. Bridges v. Wixon,* 326 U. S. 135, 154), *as to deportation proceed-*

ings, and particularly where affecting lawfully admitted, long resident aliens, *the requirements of due process of procedure must be complied with,* and that "[such a person] may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." (*Shaughnessy v. Mezei, supra,* 345 U. S. 206, 212; *Kwong Hai Chew v. Colding,* 344 U. S. 590, 595-598; *Wong Yan Sung v. McGrath,* 339 U. S. 33, 49; *Heikkila v. Barber,* 345 U. S. 229, 234; *Johnson v. Eisentrager,* 339 U. S. 763, 770-771; *Bridges v. Wixon,* 326 U. S. 135, 153-154; *Kessler v. Strecker,* 307 U. S. 22, 34; *Galvan v. Press,* 347 U. S. 522, 531; *Kwock Jan Fat v. White,* 253 U. S. 454, 457-458; *Carlson v. Landon,* 342 U. S. 524, 537; *United States ex rel. Vajtauer v. Commissioner,* 273 U. S. 103, 106; *United States ex rel. Bilokumsky v. Tod,* 263 U. S. 149, 156-157; *Tang Tun v. Edsell,* 223 U. S. 673, 681-682.)

In proceedings affecting deportation of lawfully resident aliens, inquiry and hearing "full and fair" (*Johnson v. Eisentrager, supra,* 339 U. S. at 771; *United States ex rel. Vajtauer v. Commissioner, supra,* 273 U. S. at 106), is "required by the Constitution" (*Heikkila v. Barber, supra,* 345 U. S. at 235), as a matter of "paramount law" (*Carlson v. Landon, supra,* 342 U. S. at 537; *Fong Yue Ting v. United States,* 149 U. S. 698, 713). "[M]eticulous care" must be exercised in such proceedings to render certain that there be observed there "the essential standards of fairness." (*Bridges v. Wixon,* 326 U. S. 135, 154.)

> "[W]ithout such hearing, there would be no constitutional authority for deportation. The constitutional requirement of procedural due process of law

derives from the same source as Congress' power to legislate. . . ."

—*Wong Yang Sung v. McGrath, supra,* 339 U. S. at p. 49.

"It is well established that if an alien is a lawful permanent resident of the United States . . . he is a person within the protection of the Fifth Amendment . . . [and] not even Congress may expel him without allowing him a fair opportunity to be heard."

—*Kwong Hai Chew v. Colding, supra,* 344 U. S. at pp. 596-598.

It is to be emphasized and underlined that petitioner seeks right of presence in deportation as a *due process right*—NOT as a matter of right derivable from the *Federal Criminal trial right provisions* of the Fifth and Sixth Amendments. It is the Fifth Amendment's command, "No person . . . shall be deprived of life, liberty or property, without due process of law," which petitioner invokes—*not* the provisions in that Amendment and in the Sixth Amendment securing specific rights of procedure in Federal *criminal* proceedings as such, as the provisions that "In all [Federal] criminal proceedings" there shall be secured right of jury trial, public hearing, right of counsel and confrontation, the privilege against self-incrimination, and other rights. While some of these rights are also components of due process, not all of them are, and petitioner invokes none of them as direct sources of right in deportation. Petitioner presses, solely, *due process of law.* The significance of the Federal criminal trial rights, in the instant case, and the greater significance of the due process cases reviewing *state* criminal convictions and hearings, is as such rights, or such due

process decisions, may serve as *due process measures* for the procedural content of due process in serious deportation proceedings.

By reason of the distinction just stated the instant case is not within the principle of those prior decisions of this Court which have held that deportation proceedings are not within the scope and protection of any of the strictly *criminal rights* provisions of the Constitution. Not involved, therefore, at bar, nor applicable, are the statements or decisions of this Court, for example, that right of jury trial is not secured in deportation causes (*Carlson v. Landon,* 342 U. S. 524, 537), or that the privilege against self-incrimination does not operate there (*United States ex rel. Bilokumsky v. Tod,* 263 U. S. 149; *United States v. ex rel. Vajtauer v. Commissioner,* 273 U. S. 103), or that the prohibition against *ex post facto* laws is not applicable there (*Bugajewitz v. Adams,* 228 U. S. 585; *Harisiades v. Shaughnessy,* 342 U. S. 580), nor the prohibition against Criminal Bills of Attainder (*Harisiades v. Shaughnessy, supra; Galvan v. Press,* 347 U. S. 522).

None of these cases has reach or application to the issue here—due process of procedure. Notwithstanding, thus, that the jury trial and self-incrimination Constitutional clauses do not obtain in deportation, *the requirements of due process remain.* Indeed, as previously seen, as a due process matter, neither jury trial nor right against self-incrimination are secured even in directly criminal causes, and state legislatures may alter those matters, or abolish them, without offending the Federal requirement of due process of fair procedure. (*Maxwell v. Dow, supra,* 176 U. S. 581; *Twining v. New Jersey, supra,* 211 U. S. 78; *Adamson v. California, supra,* 332 U. S. 46.) This

because, in this Court's words, as noted earlier, respecting such rights, "[it cannot be] maintain[ed] that a fair and enlightened system of justice would be impossible without them . . . [They] might be lost and justice still be done." (*Palko v. Connecticut, supra,* 302 U. S. 319, 325.) *But* it is otherwise with the indispensables of fair trial comprising commands made mandatory by due process, including right of presence.

If in serious deportation proceedings due process of procedure is required to be observed, as previously seen, and if as to state criminal trials, in the words of this Court (*Snyder v. Massachusetts, supra,* 291 U. S. 97, 106), mandatory right of presence is required by due process as to all portions of trial "bear[ing] a relation, reasonably substantial, to . . . opportunity to defend," and this because such right is in such measure "[necessary to] the fundamental justice assured . . . by the Constitution" (*id.* at p. 108), then the conclusion follows that *equally* in *deportation* causes too, where there are affected serious issues of liberty, or life, "the presence of [the] defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by . . . absence . . ." (*id.* at p. 108).

That is petitioner's thesis.

It is without consequence, utterly, for the issue here, that deportation has been classed "civil," and not "criminal," in name and form in other contexts, and for purposes of measuring the reach of Consitutional securities limited in their terms to application only in criminal areas, and as such. What counts in *due process* is *substance,* not *form* (*Simon v. Craft,* 182 U. S. 427, 436; *Foster v. Illinois,* 332 U. S. 134, 137; *Avery v. Alabama,* 308

U. S. 444, 446; *Palko v. Connecticut,* 302 U. S. 319, 327; *Near v. Minnesota,* 283 U. S. 697, 708; *Cummings v. Missouri,* 4 Wall. (71 U. S.) 277, 325), and the requirements of fair, seemly and sufficient hearing, under due process, vary with the measure and quality of the jeopardy which the hearing places in balance, and with whether matters of civil property only, or matters of liberty or life, are entailed—not with the name alone of the affected proceedings, nor even with the stated motive or purpose of society in undertaking the same.

Fair hearing is required in full form by due process, under reason, in those proceedings where there are affected most serious jeopardies, and especially jeopardies to personal liberty or life. Serious deportation causes surpass many criminal inquiries in the jeopardies involved, and may entail jeopardy even to life, and always place in balance banishment for life, and exile, a punishment no crime presently known to our law entails.

Characterizing the consequences of serious deportation causes, this Court has said that deportation "can be the equivalent of banishment or exile" (*Delgadillo v. Carmichael,* 332 U. S. 388, 391; *Fong Haw Tan v. Phelan,* 333 U. S. 6, 10), and may result in loss "of all that makes life worth living." (*Bridges v. Wixon,* 326 U. S. 135, 147; *Ng Fung Ho v. White,* 259 U. S. 276, 284.) Such proceedings "involve issues basic to human liberty and happiness, and, in the present upheavals in lands to which aliens may be returned [may entail jeopardy] perhaps to life itself." (*Wong Yang Sung v. McGrath,* 339 U. S. 33, 50.) "The stakes are indeed high and momentous for the alien. . . ." (*Delgadillo v. Carmichael, supra,* 332 U. S. 388, 391.) And, particularly is all this true as to an alien, as at bar, whose "roots

[are] deeply fixed in this land" (*Bridges v. Wixon, supra,* 326 U. S. at p. 154), and who has become "[a] part of the American community." (*Galvan v. Press,* 347 U. S. 522, 530.)

Because of its grave, pain-inflicting qualities, this Court has many times equated deportations to the criminal area of law for purposes of measuring allocable rights, and their scope, in areas of law parallel entirely to the measuring at bar of due process fair hearing—and especially so in the field of procedural law and within the territory affected by due process.

Thus this Court has applied a presumption of defense approaching closely the criminal law presumption of innocence in deportation causes (*Kwock Jan Fat v. White,* 253 U. S. 454, 464) and in denaturalization causes (*Baumgartner v. United States,* 322 U. S. 665; *Schneiderman v. United States,* 320 U. S. 118), an important consideration in the latter ruling being that denaturalization, if had, creates vulnerability to deportation.

Similarly, this Court has held applicable in deportation causes the void-for-vagueness test as to constitutionality of statutes, deriving in origin from criminal law causes (*Jordan v. De George,* 341 U. S. 223, 231), as well as the principle of strict and narrow construction of legislation. (*Delgadillo v. Carmichael,* 332 U. S. 388; *Fong Haw Tan v. Phelan,* 333 U. S. 6, 10.)

Similarly, in *Schneiderman v. United States,* 320 U. S. 118, this Court applied in a denaturalization case the principle of confining judgments strictly to the scope of the charges laid. Said this Court, aptly, there, at page 160:

"As we said in *De Jonge v. Oregon,* 'Conviction upon a charge not made would be sheer denial of due process.' 299 U. S. 353, 362. A denaturalization suit is not a criminal proceeding. But neither is it an ordinary civil action since it involves an important adjudication of status. Consequently, we think the Government should be limited, as in a criminal proceeding, to the matters charged in [the] complaint."

—*Schneiderman v. United States, supra,* 320 U. S. at p. 160.

In *Bridges v. Wixon, supra,* 326 U. S. 135, 153-154, this Court disallowed as evidence in a deportation cause the prior inconsistent statement of a witness uttered prior to the proceedings and without confrontation, cross-examination or oath. Said this Court there in pointed language:

"[They might] be admissible for purpose of impeachment. But they certainly would not be admissible in any criminal case as substantive evidence. [Citing cases.] So to hold would allow men to be convicted on unsworn testimony of witnesses—a practice which runs counter to the notions of fairness on which our legal system is founded. There has been some relaxation of the rule in alien *exclusion* cases. . . . But we are dealing here with deportation of aliens whose roots may have become . . . deeply fixed in this land. . . . Here the liberty of an individual is at stake."

—*Bridges v. Wixon, supra,* 326 U. S. at pp. 153-154, emphasis in the original.

Thus in many premises comparable to the issues framed at bar this Court has recognized that in measuring rights of hearing, issues of due process, and questions as to the fair rules of evidence, the same full safeguards and se-

curities for liberty and fair trial are required, in principle and under the Constitution, in serious deportation causes as in criminal causes, because in both "the liberty of an individual is at stake."

Right of presence is comparable in all respects, and is, indeed, even more *fundamentally* linked to fairness of hearing, and therefore to equality of right and safeguard, than the rights treated of in the listed cases. If any right is secured by due process fair trial, right of presence must be, for none is more basic.

Of course, due process of law, even as to the minimals of fair trial, must, as *all* human law, accommodate to compulsion of *necessity*. (*Moyer v. Peabody*, 212 U. S. 78; *Mattox v. United States*, 156 U. S. 237.) Thus *temporary* restraint may be had, in premises of *emergency*, without charge, let alone hearing, if reasonably necessary to prevent civil violence. (*Moyer v. Peabody, supra; cf. In re Gannon*, 16 R. I. 537, 538-541.) Similarly, even as to right of presence the necessities of death, incapacitating illness or insanity are recognized exceptions to the right, and to due process. (*Mattox v. United States, supra; West v. Louisiana*, 194 U. S. 258.) But respecting liberty, or life, and the fundamental procedural rights necessary to safely secure those greatest of human values, due process makes compromises, *only* where founded upon and compelled by *necessity*, nothing less. (*Ex parte Milligan*, 4 Wall. (71 U. S.) 2, 114 *et seq.; Kirby v. United States*, 174 U. S. 47, 61; *Motes v. United States*, 178 U. S. 458; *Mattox v. United States*, 156 U. S. 237,

242-243; *Dowdell v. United States,* 221 U. S. 325, 329 *et seq.; West v. Louisiana,* 194 U. S. 258; *Cooke v. United States,* 267 U. S. 517, 636-637; *In re Oliver,* 333 U. S. 257, 274; *Anderson v. Dunn,* 6 Wheat. (19 U. S.) 204, 231; *Offutt v. United States,* 348 U. S. (Adv. Ops.) 11, 14; *Ownbey v. Morgan,* 256 U. S. 94, 102-104; *Endicott Co. v. Encyclopedia Press,* 266 U. S. 285, 288-289.)

Below, right of presence was dispensed with upon considerations of government convenience only, and without compulsion whatever of necessity. Due process fair trial ("due process in the primary sense"—*Brinkerhoff-Faris Co. v. Hill,* 281 U. S. 673, 681) may not be thus set aside. Its roots derive from "principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (*Snyder v. Massachusetts,* 291 U. S. 97, 105.) It is bottomed on the principle that under our Constitution "respect for the dignity of all men is central." (*McNabb v. United States,* 318 U. S. 332, 343.)

Respecting liberty, or life, and the fundamental procedural rights necessary to safely secure such, the premise of due process fair trial is that safeguarded, protected hearing shall be compromised or displaced only if compelled by *necessity,* never for convience alone, or other lesser value, matter or thing.

III.

Other Non-criminal Proceedings Seriously Affecting Liberty, Body or Life, Other Than Deportation, Confirm That—Where Such Jeopardies Are Issued—Due Process Requires Mandatory Right of Presence as a Condition of Fair Judgment and Trial.

Two fields of law closely parallel to deportation in the qualities of moment at bar—serious interference with liberty, body or life—well illustrate and confirm that mandatory, secured right of presence is required indispensably by due process in hearings or proceedings affecting such jeopardies—notwithstanding that the acts undertaken by society may be classed "civil," rather than "criminal," or that the purpose of society may be other than to punish. These are (1) insanity proceedings, and (2) compulsory asexualization hearings.

Insanity Proceedings.

Although concededly "civil" in character, and not purposed at "punishment," insanity proceedings are universally held to require, as a mandatory condition of Constitutional due process of law, full rights of fair hearing and judgment as conditions of lawful commitment, including secured, mandatory right of presence—save only in exceptions created by *necessity*.

Where mental illness makes presence by the affected individual unsafe to others, or dangerous or injurious to himself, the law, by necessity, substitutes (or adds) rights of contest, hearing and attendance in other persons than the accused, as in chosen or appointed counsel, in family, friends, or legal guardian. Further, if rights of hearing, including right of attendance, are extended to the affected person but are not desired by him to be exercised, and

are not availed of, they may be waived; their exercise need not be compelled.

Absent these exceptions, however, the decisions of this Court and of all state courts, concur with unanimity that insanity proceedings, because equal entirely in severity of consequence to proceedings criminal in purpose and name, require rights of fair trial equal in safeguard, and that in consequence there must be extended to the accused, save as modified by necessity or incapacity, all of the substantive rights of hearing and defense secured by due process in criminal causes, including full and safeguarded right of presence, and subsumed within it, right of confrontation, cross-examination, and right to counsel.

There is difference in the authorities as to whether hearing must precede permanent order of commitment, or may follow such, as by habeas corpus or appeal, and there is difference, too, as to whether notice, presence and other rights secured to counsel, or to family, or through an appointed guardian, can or should be alternative to such rights in the individual himself, where such person is conceived incapacitated from acting or judging for himself. But all courts in all circumstances agree that notwithstanding that insanity proceedings are "civil" in name, and notwithstanding that they are curative rather than punitive in purpose, nonetheless, because such proceedings affect liberty equally and indistinguishably with criminal causes, due process requires for such proceedings like process to process minimal to fairness in criminal proceedings, and requires safeguard of all of the indispensable rights of safeguarded fair trial, including secured right of presence.

Simon v. Craft, 182 U. S. 427;
Chaloner v. Sherman, 242 U. S. 455;

In re Moynihan, 332 Mo. 1022, 62 S. W. 2d 410;
44 C. J. S. 78;
28 Am. Jur. 674-679;
Ex parte Allen, 82 Vt. 365, 73 Atl. 1078;
Minnesota ex rel. Pearson v. Probate Court, 309 U. S. 270, 275-277;
Matter of Lambert, 134 Cal. 626, 632-633, 66 Pac. 851;
Shields v. Shields (D. C. W. D. Mo.) 26 F. Supp. 211, 215;
In re Gannon, 16 R. I. 537, 538-541, 18 Atl. 159;
Barry v. Hall (U. S. C. A. D. C.), 98 F. 2d 222, 225-226;
Appeal of Sleeper, 147 Me. 302, 87 A. 2d 115.

True, right of presence is not often issued *eo nomine* in such proceed , distinct and separated from the deeper reaching rights of "notice," "opportunity to defend," and "right to be heard," but in all decisions touching the subject, or area, of presence, directly or indirectly, such right, explicitly or implicitly, is either expressed, or accepted without contest, as indispensable in such proceedings to safeguard of fair trial, and to due process of law.

The decision of this Court in *Simon v. Craft,* 182 U. S. 427, is basic as to security of presence by Constitutional requirement in such proceedings. There an insanity commitment of one Jetta Simon, and the appointment of a guardian, was challenged collaterally, and as a matter of real property chain of title, upon a claim that the proceedings in entirety were void on their face because the sheriff's return showed the accused incompetent had been taken in custody and had not been produced at the hear-

ing. The sheriff's return, as the state law in such premises required, certified and averred the claimed incompetent had not been produced at the hearing because to do so "[would have been] inconsistent with [her] health or safety." (182 U. S. at p. 435, n. 1.) This Court, assuming plainly, and as first premise, that in insanity proceedings fair trial and due process in normal premises would require absolute security of presence of the person affected, sustained the proceedings challenged there as an exception, an exception caused and excused by *necessity*—danger to health, or to safety. Observing pointedly that the truth and honesty of the sheriff's certification was in no manner controverted or challenged, this Court concluded that confinement in the premises there was to be interpreted as "to enforce . . . attendance of the alleged *non compos* rather than to authorize a restraint," declaring specifically it was the "absolute duty" of the sheriff in the premises to "bring . . . the person before the court [for the insanity proceedings]" if "in a fit condition to attend." Said this Court, in part:

> "The invalidity of the proceedings in the inquisition of lunacy . . . is in substance predicated on the contention that the writ directed to the sheriff authorized that official to determine whether it was consistent with the health and safety of Mrs. Simon to be present at the trial of the question of her sanity; that the sheriff decided this question against her, and she was detained in custody and not allowed to be present at the hearing of the inquisition. The latter claim, however, is founded [only] upon the return endorsed by the sheriff on the writ directed to him. At the trial below there was no offer to prove, by any form of evidence, that Mrs. Simon was in fact of sound mind when the proceedings in lunacy were

instituted, or that she desired to attend, and was prevented from attending the hearing, or was refused opportunity to consult with and employ counsel to represent her. The entire case is thus based solely on the inferences which are deduced, as stated, from the face of the return of the sheriff. * * * The contention . . . urged is . . . that the return of the sheriff conclusively established that Mrs. Simon was taken into custody and was hence prevented by the sheriff from attending the inquest or defending through counsel if she wished to do so in consequence of the notice which she received. It seems, however, manifest—as it is fairly to be inferred the state court interpreted the statute—that the purpose in the command of the writ, 'to take the person alleged to be of unsound mind, and, if consistent with his health or safety, have him present at the place of trial,' was to enforce the attendance of the alleged *non compos,* rather than to authorize a restraint upon the attendance of such person at the hearing. In other words, that the detention authorized was simply such as would be necessary to enable the sheriff to perform the absolute duty imposed upon him by law of bringing the person before the court, if in the judgment of that officer such person was in fit condition to attend, and hence it cannot be presumed, in the absence of all proof or allegation to that effect, that the sheriff in the discharge of his duty, after serving the writ upon the alleged lunatic, exerted his power of detention for the purpose of preventing her attendance at the hearing, or of restraining her from availing herself of any and every opportunity to defend which she might desire to resort to, or which she was capable of exerting."

—*Simon v. Craft, supra,* 182 U. S. at pp. 433-436.

In *Minnesota ex rel. Pearson v. Probate Court*, 309 U. S. 270, this Court, although declining to enjoin *in limine* the insanity proceedings put in issue there* upon either substantive or procedural ground of attack, took express note of "the special importance" of maintaining "the basic interests of liberty" in such cases, and of safeguarding there "the fundamental rights embraced in the conception of [procedural] due process." Also, note was taken, and specifically, that the proceedings affected there provided "for hearing and for examination of the person proceeded against," *i. e.*, for secured attendance and presence. Said this Court, there:

> "There remains the question whether, apart from definition and classification, the procedure authorized by the statute adequately safeguards the fundamental rights embraced in the conception of due process. In this relation it is important to note that appellant has challenged the proceedings *in limine* by seeking to prevent the probate judge from entertaining it. To support such a challenge, the statute in its procedural aspect must be found to be invalid on its face and not by reason of some particular application inconsistent with due process . . . As we have seen [the procedure established provides that] the facts must first be submitted to the county attorney who must satisfy himself that good cause exists. He then draws a petition which must be 'executed by a person having knowledge of the facts.' The probate judge must set the matter for hearing and for examination of the person proceeded against. Provision is made for his representation by counsel and for compelling the production of witnesses in his

*(Confinement proceedings affecting persons of "psychopathic personality.")

behalf. * * * We fully recognize the danger of a deprivation of due process in proceedings dealing with persons charged with insanity or, as here, with a psychopathic personality as defined in the statute, and the special importance of maintaining the basic interests of liberty in a class of cases where the law though 'fair on its face and impartial in appearance' may be open to serious abuses in administration and courts may be imposed upon if the substantial rights of the persons charged are not adequately safeguarded at every stage of the proceedings. But we have no occasion to consider such abuses here, for none have occurred. The applicable statutes are not patently defective in any vital respect and we should not assume, in advance of a decision by the state court, that they should be construed so as to deprive appellant of the due process to which he is entitled under the Federal Constitution."

—*Minnesota ex rel. Pearson v. Probate Court, supra,* 309 U. S. at pp. 275-277.

Again, in *Chaloner v. Sherman,* 242 U. S. 455, this Court again upheld an insanity commitment, and appointment of a guardian, as satisfying due process of law, where it was made to appear (and *only* because it was made so to appear) that while the affected person was not present at the hearing, he had been given notice and opportunity to attend, and had voluntarily determined not to appear,* and that, additionally, according to credible medical testimony, accepted at the hearing, to have compelled his appearance against his will would have

*The individual affected by the proceedings avowedly refused to attend, because he feared the judgment would be adverse to him if he did appear; this appears clearly in the report in the court below, *Chaloner v. Sherman* (C. C. A. 2d 1914), 215 Fed. 867, 872.

been injurious to his mental health.* The commitment was sustained as meeting the necessities and requirements of due process in such stated circumstances. Said this Court:

> "At each stage in the proceeding leading up to the order of June 23, he was personally served . . . with notice and was given an opportunity to be heard. Thus he had notice of the motion, on May 19, to appoint the *commission de lunatica inquirendo;* of the inquisition of June 12th; and of the motion to confirm the inquisition and for appointment of a committee on June 23. Such notice and opportunity to be heard at the inquisition was required by the law of New York though not expressly recited in the statute; *Matter of Blewitt,* 131 N. Y. 541; *Gribley v. College of St. Francis Xavier,* 137 N. Y. 327; *Matter of Fox,* 138 App. Div. 43. Plaintiff was physically able to be present at this hearing. But he did not appear, did not send anyone to represent him, nor ask for an adjournment. At the inquisition the commission and the jury, after hearing witnesses, concluded that his attendance was unnecessary and did not require him to attend. There was evidence that his enforced attendance would be detrimental to his mental health."
>
> —*Chaloner v. Sherman, supra,* 242 U. S. at pp. 459-461.

The leading state case is *In re Moynihan,* 332 Mo. 1022, 62 S. W. 2d 410, 91 A. L. R. 74. Presence is declared indispensable to due process in insanity proceedings there "even [if requiring] the precaution of an attendant." It is developed there—with pointed parallel to the premises of deportation at bar—that full require-

---

* (". . . would do him harm mentally."—215 Fed. at p. 870.)

ments of fair hearing and trial, including right of presence, are required in insanity commitments, notwithstanding that right of jury trial does not obtain there since such proceedings are not strictly "criminal," and notwithstanding that the purpose of society in such proceedings is curative, and not to punish. The Missouri Court, on these scores, stated in that decision:

> "Petitioner says these sections violate the Fifth and Fourteenth Amendments to the Constitution of the United States, contending that authorizing the probate court to find a person insane and to appoint a guardian of his person and property, without having him present and without the verdict of a jury, deprives him of his liberty and property without due process of law. [But] due process of law [does not] require a trial by jury, even in all criminal cases. * * * Since an insanity hearing is a civil case . . . it would seem at least that due process of law does not require that there be a jury trial, whether demanded or not, and we so hold. * * * However, even though an insanity proceeding is primarily for the benefit of the person suspected of being insane, nevertheless depriving a person of his liberty and his freedom to do as he sees fit with his property and putting him under the stigma of irrationalism is such a serious matter that there should be, for the person whose sanity is inquired into, every proper safeguard. As this Court said in the *Searcy* and *Shanklin* cases, declaring unconstitutional the section authorizing such hearings without notice: 'If he be a raving maniac, he can appear by attorney or through his friends and see that a proper person is appointed guardian, or that a proper care is given to his property and to his person. In addition, what if the person was not really insane at

all, and without notice was adjudged insane and confined in an asylum, and management of his property given to another? In such contingency the propriety of notice would be manifest, and, if given, would defeat the recovery of a judgment. . . . [The] Marquis case (85 Mo. 615) is an instance in our own reports where a citizen was so adjudged insane without notice, and at the very next term of court appeared and proved that he was not, and never was, insane. But however the past experience may have been, the fact remains that the possibility of such an outrage being perpetrated is afforded by the statutory provisions referred to; and it is the duty of the courts, whenever the question arises, to prevent the happening of such a wrong, by declaring those provisions to be unconstitutional.' * * * [In consequence, under valid and constitutional procedure], if the person confined desires . . . to attend the hearing . . ., he has that constitutional right, and it would be the duty of the superintendent to allow it, even with the precaution of an attendant, if he thought that necessary."

—*In re Moynihan, supra*, 332 Mo. at pp. 1028-1039.

In *Matter of Lambert*, 134 Cal. 626, 632-633, 66 Pac. 851, the Supreme Court of California, respecting the necessity for according due process in insanity confinements, observed:

"An order for the commitment of a person to an insane hospital is essentially a judgment by which he is deprived of his liberty, and it is a cardinal principle in English jurisprudence that before any judgment can be pronounced against a person, there must have been a trial of the issue upon which the judgment is given. Under the laws of this state, a guard-

ian of the person or the estate of an insane person cannot be appointed without giving him notice of the application therefor. (Code Civ. Proc., sec. 1763); nor can a judgment for so small a sum as five dollars be rendered against him unless he has been served with a summons in the action. (Code Civ. Proc., sec. 411.) Much more is there reason for giving him notice of an application to deprive him of his personal liberty."

—*Matter of Lambert, supra,* 134 Cal. at pp. 632-633.

In 44 C. J. S. 78, respecting right of presence in insanity proceedings, it is declared:

"The alleged lunatic has a right to be present in the hearing or trial; and generally it is necessary that he be present, except where he has been duly notified, or in certain cases in which his presence may be dispensed with, as where it might injure his health or endanger his safety, or where he refuses to submit himself to the court's jurisdiction.

"As appears *infra* section 27, the denial of the right to be present may be sufficient cause for setting aside the inquisition, and a finding of insanity without the presence of the lunatic, as required by statute, has been declared void; but it has also been held that this irregularity will not *per se* entirely avoid the inquisition, and that a proceeding without the presence of the alleged lunatic is only voidable and liable to attack by him, but not void as to other parties, so as to be subject to collateral attack."

Accord:

28 Am. Jur. 674-679.

Respecting the right, and the significance, of presence of the accused in insanity proceedings, to insure fair

judgment, the Vermont Supreme Court, in *Ex parte Allen*, 82 Vt. 365, 373, 73 Atl. 1078, stated:

> "'It is a fundamental principle of justice, essential to every free government, that every citizen shall be maintained in the enjoyment of his liberty and property unless he has forfeited them by the standing laws of the community, and has had opportunity to answer such charges as, according to those laws, will justify a forfeiture or suspension of them. And whenever the Legislature has provided that, on account of crime or misfortune, the public safety or convenience demands a suspension of these essential rights of the individual, and has provided a judicial process, by which the fact shall be ascertained, it is to be understood as required that the tribunal to which is committed the duty of inquiring and determining shall give opportunity to the subject to be heard in support of his innocence or his capacity.' In *Evans v. Johnson*, 39 W. Va. 299, 19 S. E. 623, it is said: 'Often if given notice he (the alleged insane person) will be prompt to attend, and in his person be the unanswerable witness to his sanity; often, if not given notice, those interested in using or robbing him of his property will effectuate a corrupt plan. Almost as well might we convict a man of crime without notice. . . .'"

Accord:

> "The record shows affirmatively that petitioner was not present at the hearing or inquiry held by the Probate Court. The Missouri Statute requires that he be notified of the hearing *and of his right to be present*. . . . That Statute (Sec. 450) without the requirement of notice had been held unconstitutional under the due process clause of both the Federal and Missouri Constitutions. (*Hunt v. Searcy*,

167 Mo. 158, 67 S. W. 206, 214; *Shanklin v. Boyce*, 275 Mo. 5, 204 S. W. 187.) The Missouri Supreme Court held in *Hunt v. Scarcy, supra*, that a judgment of insanity, without notice to the person adjudged insane and without his appearance, was void, whether the Statute required notice or not because under such conditions due process was absent. The judgment of the Probate Court does not show why petitioner was not present at the hearing. The evidence in support of the present application does. The reason was not that petitioner was violently insane but because he was confined in the Asylum at the order of the Probate Court and the Guardian and not permitted to be present. If jurisdiction does not exist when a person is not notified that he is entitled to be present at the inquiry into his sanity, then with much greater reason is jurisdiction as well as due process lacking when he is notified but not permitted to do what the notice tells him he has a right to do."

—*Shields v. Shields* (D. C. W. D. Mo.), 26 F. Supp. 211, 215.

Discussing insanity confinement, right of presence, and the requirements of due process hearing, the Supreme Court of Rhode Island, in *In re Gannon*, 16 R. I. 537, 538-541, 18 Atl. 159, stated:

"The contention is that sections 11 and 12 of chapter 74 deprive the persons committed under them of their liberty without due process of law. . . . The only safeguard against an improper commitment [affiorded under the statutory sections attacked] is the certificate of two practicing physicians of good standing, a certificate which may be given entirely *ex parte*. We are not prepared to say that even so the sections would be void, if they were intended

simply for temporary detention, preliminary to or pending a proper judicial inquiry. The right of personal liberty is to be reasonably understood, and there are many restraints which are allowed as consistent with it. Thus the passengers and crew of a ship are liable to restraints other than those which are merely incident to their position on shipboard. They must submit to such restraints as are necessary for due discipline and the general safety. . . . Children may be confined for instruction or punishment. Sick people, in the delirium of fever, may be held on their beds by force, and lunatics, who are dangerous to themselves or others, may be shut up in the dangerous periods of their lunacy. [But, in the case at bar, permanent, continuing commitment is provided, and a commission of inquiry to conduct a hearing] is to be appointed, not at the instance of the person confined, but only on application by some other person, who, unless applying under section 29, is required, before the appointment, to pay or secure the payment of the expenses, which are sometimes onerous. And, moreover, it is provided in express terms that no notice of the pendency of the inquiry before the commission shall be served on the person confined, and that such person shall not have the right to confer with counsel, to produce evidence, or to be present at the inquisition. [In consequence the statutory sections] deprive the persons confined under them of . . . liberty without due process of law."

—*In re Gannon*, 16 R. I. at pp. 538-541.

Accord:

Appeal of Sleeper, 147 Me. 302, 87 A. 2d 115.

Many cases note—in a manner entirely parallel to deportation issues as at bar—that the mere circumstance

that right of jury trial may not obtain in insanity proceedings, because such are not strictly "criminal," does not gainsay that full requirement of procedural due process, and of fair trial, obtains. Jury trial is not indispensable to due process even in criminal causes. However, the requirements of due process of procedure, and of fair trial, must be met.

> "The appellant's confinement in Saint Elizabeth's under the Treasury Department letter until the time of the order of remand on the writ of habeas corpus of January 26, 1937, was illegal. Insanity is not a crime and therefore the constitutional guaranty of jury trial is not applicable; nevertheless, confinement in a mental hospital is as full and effective a deprivation of personal liberty as is confinement in jail. The Fifth Amendment is applicable in the District of Columbia, *Sims v. Rives*, 1936, 66 App. D. C. 24, 31, 84 F. 2d 871, 878, and cases cited; and it guarantees that no person shall be deprived of liberty without due process of law."
>
> —*Barry v. Hall* (U. S. C. A. D. C.), 98 F. 2d 222, 225-226.

Asexualization Proceedings.

Similar import for the question at bar is to be found in the law affecting proceedings for compulsory sterilization or asexualization. Statutes providing for such compulsory operations have now been adopted in more than a majority of the states, on the initial example of Indiana in 1907.*

---

*Report of the Committee of the American Neuralogical Association for the Investigation of Eugenical Sterilization, "Eugenical Sterilization" (1936) Chapter II., pp. 7-21; James E. Hughes, "Eugenic Sterilization in the United States" (1940), supplement No. 162 to the Public Health Reports, the United States Public Health Service; Note, "Sterilization Laws; Their Constitutionality" (1937), 17 B. U. L. Rev. 246, 247-249.

Where sterilization laws are punitive in object and purpose, and a very few are,* serious doubt exists even as to substantive constitutionality, let alone as to mandatory Constitutional requirement for due process fair hearing in procedure. (*Davis v. Berry* (D. C. S. D. Ia.), 16 Fed. 413; *Mickle v. Henrichs* (D. C. D. Nev.), 262 Fed. 687; *cf. Skinner v. Oklahoma,* 316 U. S. 535.) But, as to enactments purposed at eugenical sterilization of defectives, it is now well established that such enactments are not punitive in character, but are civil, and hence are not prohibited as "cruel or unusual" criminal punishment, and that, if reasonable in substantive terms, such statutes are constitutional as matters of substantive law. (*Buck v. Bell,* 274 U. S. 200; *Smith v. Command,* 231 Mich. 409, 416, 204 N. W. 140, 142, observing: "There is no element of punishment involved in the sterilization of feebleminded persons. In this respect it is analogous to compulsory vaccination. Both are non-punitive.")

Nonetheless, though "civil" and non-punitive, asexualization proceedings, under established law, must faithfully

---

*Note, "Sterilization Laws; Their Constitutionality," *supra,* 17 B. U. L. Rev. 246, 247. In the Report of the Committee of the American Neurological Association, *supra,* "Eugenical Sterilization," p. 1, it is stated: "The most primitive form of sterilization is undoubtedly castration. The impulse to inflict injury upon an enemy's genitalia as a measure of punishment and insult is a deeply rooted one in the human race, which finds expression at times among the most civilized modern nations, as well as among savages. When Heloise's uncle castrated Abelard, it was certainly with no eugenic purpose in mind, but to punish and show contempt for the man who had betrayed the honor of her family. There have been famous cases in the history of every community when such revenge has been taken, occasionally on a wholesale scale. The suspicion of a sadistic motive must always arise when genitalectomy is advocated for any group of physically healthy people, as, for example, in Turkey and in occasional communities of the Western World where castration of certain classes of criminals has been prescribed by law."

afford fairest hearing in procedure, as a requirement of due process, and in such proceedings it has always been required, explicitly and implicitly, in all views of the law, that full safeguard be observed of right of confrontation and presence, as well as notice, both as to the individual affected, and, if he be unable adequately to act in his own behalf, as to his family, or appointed guardian.

Thus in *Buck v. Bell*, 274 U. S. 200, the eugenic sterilization statute of Virginia was sustained, against substantive challenge, only after notation by this Court (274 U. S. at p. 206) that the procedure of the affected statute provided that notice be given the concerned individual, and his family, and that ". . . the inmate may attend the hearings if desired by him or his guardian." At page 207, note was particularly taken there, "The attack is not upon the procedure but upon the substantive law."

In *Skinner v. Oklahoma*, 316 U. S. 535, 541, this Court, in discussing the hard consequences of even eugenic asexualization, observed:

> "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty."
>
> —*Skinner v. Oklahoma, supra*, 316 U. S. at p. 541.

In *Davis v. Berry, supra,* 216 Fed. 413, 418 a statute providing for sterilization was held void, among other grounds, because it permitted hearing "in the prisoner's absence . . ." (216 Fed. at p. 418.) Said the court there:

> "[The] hearing was a private hearing, and the prisoner first knew of it when advised of the order. Due process of law means that every person must have his day in court, and this is as old as Magna Charta; that sometime in the proceedings he must be confronted by his accuser and given a public hearing."
>
> —*Davis v. Berry supra,* 216 Fed. at p. 418.

In *Williams v. Smith,* 190 Ind. 526, 527, 131 N. E. 2, this express language is adopted and approved. There, a statute providing for sterilization was held void as violating procedural due process, because, among other reasons, there was denied right of confrontation and right of cross-examination.

In *In re Hendrickson,* 12 Wash. 2d 600, 123 P. 2d 322, the Supreme Court of Washington held void, as a violation of due process of procedure, a sterilization statute failing to provide for notice, right of presence and confrontation to the families, and guardians, of accused defectives, as well as and in addition to providing for such rights as to the concerned persons individually.

In J. H. Landman, "Human Sterilization" (1932) at pages 116-117 it is stated that "the application of [procedural] due process of law to the question of human sterilization legislation is obvious," and an accused defective "[cannot be] precluded from defending himself or herself at . . . hearings" so purposed.

In Weihofen, "Mental Disorder as a Criminal Defense" (1954), at page 43, it is stated:

> "In addition to the substantive requirements of the due process clause that an invasion of personal liberty must be found reasonable to be held constitutional, procedural due process requires that a person's rights be determined in a fair and orderly way, upon adequate notice and opportunity to be heard. Even if the statutory definition of the classes subject to sterilization is not unreasonable, procedural due process requires that an individual be given a fair hearing on whether he in fact comes within the class mentioned. Under the typical statutory procedure, if the superintendent upon examination of the patient is of the opinion that the operation should be performed, he petitions an administrative board to conduct a hearing. The patient is served with a copy of the petition and is usually allowed to appear at the hearing and to be represented by an atorney. This satisfies the requirement of procedural due process."

Accord:

> "Whether or not the statute offends the Constitution in that it fails to provide due process of law, cannot be entered into here. . . . It is sufficient for our purposes to state that 'due process of law means that every person must have his day in court . . . that some time in the proceedings he must be confronted by his accuser and given a public hearing.' "
>
> —Note, "Sterilization Laws; Their Constitutionality," 17 B. U. L. Rev. 246, 252.

In discussing the necessity in asexualization proceedings —much exceeding the need in matters affecting merely property—for securing full rights of due process of

procedure and fair hearing, notwithstanding that such proceedings are not punitive in purpose, the Supreme Court of North Carolina, in *Brewer v. Valk*, 204 N. C. 186, 191, 167 S. E. 638, stated:

> "Under the due process clause, can this sterilization be done *without notice or a hearing?* It has long been settled to the contrary in this jurisdiction—we have many cases affecting property rights. * * * It goes without saying that the same must apply to human right. If the Constitution and laws in relation to due process—notice and hearing, which undoubtedly apply to a material thing, they should more so apply to the human element. 'And he said unto them, What man shall there be among you that shall have one sheep, and if it fall into a pit on the Sabbath Day, will he not lay hold on it and lift it out? *How much*, then, is a man better than a sheep?' St. Matthew 12: 11, 12. (*Miller v. Cornell*, 187 N. C. at p. 555.) The matter of sterilization and contraception is discussed in Herzog, Medical Jurisprudence, c. xlvii at p. 713, where it is said: 'The Virginia statute [provides that no sterilization shall be imposed without a hearing by a board of experts] *at which time the patient may defend himself or herself* . . .'"
>
> —*Brewer v. Valk, supra*, 204 N. C. at p. 191, emphasis in original.

Accord:

> "We think that the bill not only violates the Fourteenth Amendment of the Federal Constitution as to due process, but [also the State due process clause, as well]. We think that the sterilization of a person is such an injury to the person as is contemplated by the quoted provisions—just as much so as to deprive him of any other faculty, sense, or limb—and that due process of law means that this cannot be done

without a hearing on notice before a duly constituted tribunal or board, and, if this is not a court, then with the untrammeled right of appeal to a court for a judicial review from the finding of the board or commission adjudging him a fit subject for sterilization. This right the bill in question denies, or does not preserve; hence it is unlike the Virginia statute . . . dealt with and upheld in the case of *Buck v. Bell*, 274 U. S. 200."

—*In re Opinion of the Justices*, 230 Ala. 543, 547, 162 So. 123.

See also:

Smith v. Schaffer, 126 Kan. 607 608-609, 270 Pac. 604-605;

Smith v. Command, 231 Mich. 409, 422-427, 204 N. W. 140, 144.

IV.

Aggravated Circumstances at Bar Rendering Particularly Grievous the Denial of Due Process of Law, by Denial by Right of Presence, at Bar.

A. The Trial Was Totally in Absentia.

A trial conducted even in small part in premises of unfair procedure, lacking in any of the fundamental safeguards of due process hearing, is, in true sense, trial without security of right, and is violative of the Constitution. If one juror, of twelve, is a false juror, or one witness, of many, is a perjured witness knowingly suborned at instigation of the government, or if mob domination undermines a one-tenth portion only of the material proceedings in a trial, fair judgment, by Constitutional process, is not had. Similarly, if one witness, in proceedings affecting many witnesses, is examined *in camera*, public trial is denied.

In like and equal manner, if one witness, even out of many, is examined *ex parte*, and by "deposition," as below, in violation of mandatory, secured right of presence—and thereby without confrontation, cross-examination or any substantive participation by the accused—there is, in true sense, violence to the requirements of fair hearing and a denial of due process of law.

But at bar the denial was *total*, and the injury, therefore, was *entire*.

At bar, save for inconsequential evidentiary matters affecting alienage only, the *entire substance* of petitioner's hearing was conducted in Hawaii, while petitioner, and his counsel, were in Los Angeles, and while petitioner was in confinement there. The "depositions" taken thus *ex parte* and without pretense of secured presence, constituted, as previously related in the Statement of the Case, *supra*, the *sole* evidence offered by the government as to the substantive issue of claimed deportability.

This is *total trial in absentia*.

Accordingly, at bar, the vice of foreign, *ex parte* depositions, had without presence, assumes the qualitative measure and degree of *total* impropriety of procedure of trial, not merely partial or incidental variation of form. Unless condemnation in such serious deportation proceedings as at bar may be had without any requirement of right of presence at all, the proceedings below must fail. The requirement of due process is that "justice . . . not only be done but . . . manifestly be seen to be done." (*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 172, n. 19, Frankfurter, J., concurring, quoting the English decision, *Rex v. Bodmin Justices* (1947), 1 K. B. 321, 325.) *Total trial in absentia*, in a proceeding affecting liberty, and even jeopardy of life, cannot be "justice . . . seen to be done."

B. At Bar Passport-Photo Identification—(With Name Thereon)—Was Substituted Totally for Right of Confrontation.

As set forth in the Statement of the Case, *supra*, the deposition-witnesses in Hawaii predicated the entirety of their *ex parte* "testimony" in the case below upon "identification" of petitioner had *solely* on basis of examination of a Chinese passport-photo and passport [Ex. 2], issued to "David Hyun," and so showing upon its face. [Ex. 2; R. 234, 244-245, 261; *cf.* R. 108-109.]

It makes a mockery, entirely, of the right of *confrontation*, of accusation had only *face to face*,—a right bearing deepest roots, as seen, in history and in due process law and requirements of fair hearing—to suffer substitution therefor of accusation by passport-photograph—and by document bearing the victim's name upon its face, at that.

Such process cannot be "due" process for liberty or life; it is undependable, unsafeguarded process upon very statement.

C. The Deportation at Bar Affected a Life-Resident Alien, Lawfully Admitted, and Put in Issue Gravest Jeopardies to Liberty, and Even to Life, or of Physical Persecution, to Petitioner.

The jeopardies and threatened consequences to liberty and person, and even life, put in issue by the deportation proceedings below, as set forth heretofore in the Statement of the Case, were of such quality and number as to equal, and indeed in features surpass, the consequences in any criminal proceedings, even of the most serious nature.

Purposed by the government, in the proceedings below, was deportation of an alien who, in earliest childhood had

entered the United States lawfully, and with his parents, for permanent residence, an alien who has now lived all of the meaningful years of life to date in the United States and knows no other homeland. Save for purest accident of place of birth petitioner's life is and has been, in all respects, as if actually born within the United States and always there resident. Petitioner is married to a citizen wife, is an architect by profession, and is the father of two minor children, sons, both citizens as well. Hence, even leaving aside momentarily the matter of jeopardy to life or of physical persecution, there is issued at bar deportation in its most hurt-inflicting form, involving in the words of this Court, the full "equivalent of banishment or exile" (*Fong Haw Tan v. Phelan*, 333 U. S. 6, 10; *Jordan v. De George*, 341 U. S. 223, 231), and loss of "all that makes life worth living." (*Ng Fung Ho v. White*, 259 U. S. 276, 284; *Bridges v. Wixon*, 326 U. S. 135, 147.)

In such a proceeding due process, if it is to be meaningful at all, must secure fairness of hearing measured by at least the *minimals* of fairness required in criminal and non-criminal proceedings outside deportation affecting liberty, person or life, including, in particular and specifically, the fundamental safeguard of mandatory, secured presence of the person accused or affected.

Petitioner at bar, if deportation be had, forfeits family, liberty and homeland, and faces literal "banishment and exile" from the only country known to him. It cannot accord with reason to suggest that such can be imposed upon him with less regard for fair hearing because only inflicted in deportation proceedings. It denies all substance in law to say the Constitution in securing fair hearing

regards less a man's liberty or life, because merely government chooses the form and forum of deportation, rather than of criminal charge, under which to proceed.

Forcible, total and permanent separation from wife and children, loved and loving as at bar, is a forfeiture which in itself is exceeded by few criminal penalties, if any, in severity. Deportation threatens such.

Further, consider the consequences of life exile or banishment, as a forfeiture. Though anciently used in criminal causes when primitive values* and mores obtained, and particularly in political causes, such consequence is admitted in modern society for *no* offense, but is condemned universally as unfitting to civilized standards. Banishment and exile, to roam the world at large, under our Constitution would plainly be barred as cruel and unusual punishment if imposed as penalty for a crime, no matter by how fair a hearing guilt might first be determined. It accords little with fair policy to suggest that such a consequence, so grievous in nature as to be Constitutionality "fit" as punishment to no possible crime, can yet be validly inflicted without even fairness in hearing and judgment because only given different name and motive by government in proceedings of deportation.

Moreover, at bar there obtained even jeopardy to life, and of physical persecution. As heretofore related, deportation was purposed by the government at bar to South Korea, as country of destination, a land wherein, as evidenced by circumstances judicially noticeable by this Court and widely commented upon by informed and able observers, there has been secured in the recent past small

---

*Stephen, "A History of the Criminal Law of England" (1883), Vol. I, pp. 14 and 23.

guarantee even for life or person where political dissent has been manifested or upturned.

As previously related, petitioner, as an avowed and open political critic and opponent of Syngman Rhee, and of his government and policies, claimed jeopardy, if deportation be had to South Korea, of physical persecution or death. In administrative proceedings paralleling the review proceedings here, petitioner made application on ground of such jeopardy for an administrative stay against deportation to such country, on basis of extensive documentary material and affidavits of impartial, informed individuals.

After administrative hearing an order granting such stay, on basis of jeopardy of physical persecution, was issued by the Service, and such stay is presently in effect. However, stay orders of this character, are discretionary, and temporary only, under the statutes, and do not eliminate jeopardy since they are subject to recall with no certainty of right.

The jeopardy to life, and of physical persecution, in South Korea, to persons dissident from the policies of Syngman Rhee, is a matter evidenced by the known record of history. It is history that Rhee has many times jailed, interfered with and intimidated members even of the South Korean Assembly; that in June, 1953 in violation of all undertakings to both the United Nations and the United States, Rhee "released," and violently, all U. N. held prisoners of war of Noth Korea; and that in August, 1955 he instigated, approved and condoned "demonstrations," involving extensive violent acts, against members of the United Nations Truce Inspection Team in South Korea, and troops attending them, including

United States troops and officers. World comment has included such as the following: Harpers Magazine, February, 1954: "[Rhee] is without question a dictator, seldom reluctant to use police intimidation and force . . . [He] has used mob violence . . ."; Walter Sullivan, New York Times, January 31, 1950: ". . . Torture appears to be an accepted practice . . ."; The London Times, April 21, 1954: ". . . strong-arm methods . . ."; Los Angeles Times, August 8, 1955: ". . . strong-arm methods"; William O. Douglas, "North from Malaya" (1953), p. 5: ". . . some of the . . . opposition has either fled the country or is in jail . . ."; Los Angeles Times, June 24, 1953: "Dr. Chough Pyong Ok, former Home Minister, was beaten severely and his Seoul residence ransacked early today because he spoke out against Rhee's actions."; New York Times, June 5, 1952: "Britain protested today to President Syngman Rhee over his purge of hostile members of the South Korean Assembly and continuation of martial law in Pusan . . ."; Newsweek, June 9, 1952: "President Syngman Rhee declared: '. . . The majority of the National Assemblymen (of the Republic of Korea) were traitors in the pay of the enemy. They must be jailed in order to save democracy . . .'"; New York Times, July 19, 1953: "Mr. Chough 59 year old member of the National Assembly, was seized, and beaten and then jailed for daring to speak in favor of the UN Command and [daring to criticize] President Rhee for ordering the release of the 27,000 anti-communist prisoners-of-war."

In petitioner's administrative hearing on physical persecution affidavits respecting jeopardy were filed which included declarations such as the following: Frank Gibney, associate editor, Time Magazine, April 4, 1954: "If

Mr. Hyun is politically objectionable to Syngman Rhee . . . there is no doubt in my mind that he will be subject to physical persecution, possibly of the direst nature, on his return to Korea."; Elmer H. Brown, American Friends Service Committee, March 10, 1954: "It is my thoughtful opinion that should the deportation of David Hyun to South Korea be consummated it would probably be tantamount to the death sentence."; Roger N. Baldwin, American Civil Liberties Union, March 10, 1954: ". . . I have no doubt whatever that David Hyun would be regarded by that government as a Communist and would be subjected to imprisonment for a long term or execution as such."; Willard S. Townsend, International President, United Transport Service Employees Union, March 10, 1954: "That it is my considered opinion, based on past knowledge of political conditions in South Korea that great bodily harm and possible death would come to David Hyun were he deported to that country; . . . "; Stewart Meacham, Labor Advisor to the Commanding General of the United States Armed Forces in Korea 1946-1947, February 16, 1954: ". . . it is my considered belief . . . that he will meet with violent death shortly after his arrival in South Korea . . . I have in mind specifically the murder of Kim Koo, the wartime summary executions of men, women and even their children, the use of terror methods against the legislative assembly, the physical assaults . . . and the imprisonment[s] . . ."

In fine, the premises at bar exemplify deportation in its most hazardous and pain inflicting form possible, with forfeitures affecting liberty, and even life, equalling, and indeed in features surpassing, the penalties put in issue in any criminal cause, even the most serious. In conse-

quence, particularly at bar, deportation process, to be fair and sufficient under Constitutional requirement of due process of procedure, must require at least the minimum rights and safeguards indispensable to just judgment in criminal and non-criminal proceedings outside deportation affecting seriously, limb, liberty or life.

D. The Violation of the Right of Presence Below Was Needless and Was Had Only to Suit Government Convenience and Economy.

Particularly to be noted at bar, also, is the circumstance that denial of the safeguard of presence, and resort to depositions, was undertaken below out of no reason or compulsion of necessity, but solely for considerations of convenience and accommodation.

The witnesses whose depositions were taken, as heretofore stated, all resided in Hawaii and were within Federal jurisdiction, and were living and well, and all such witnesses *could* have been produced by the government at petitioner's hearing had the government so undertaken. They were not produced simply because appearance in Hawaii by deposition suited convenience. As set forth in the Statement of the Case the *sole* basis offered by the government for the motion for the depositions was that: ". . . the persons . . . are residents in the Territory of Hawaii, and for that reason the motion [is] made . . ." [R. 118].

Thus the instant case carries with it a fearsome precedent—trial without presence in deportation wherever such a procedure suits administrative convenience and choice.

It was conceded below by the government [R. 215-218] that deportation witnesses within the United States (and Hawaii is no different) are on occasion moved by the

government from one place to another to permit production at place of hearing for purposes of confrontation and cross-examination, the example given being the production at various political deportation hearings of the witness Paul Crouch. The government seeks here a ruling that such production is at pleasure and not of right.

If such precedent be established the spectacle is presented of possible wholesale deportation trials in *absentia* with accusations made by informer witnesses in New York or Washington, D. C., on wholesale scale, while the hapless alien victims are miles removed in California or other distant points, and where the breaking of life and family is had totally *ex parte* and without check or restraint whatever by confrontation or cross-examination.

Under law, where the right of presence obtains at all disregard of it may be justified only by *necessity*. Subsumed within presence are the included rights to confront witnesses, to cross-examine, to observe the conduct of one's trial, and the right to assist, and be assisted by, counsel. Disregard of such fundamentals of fair hearings can only be justified by compelling necessity.

Where a witness cannot be produced at the place and forum of hearing because dead, ill, insane, or beyond the physical jurisdiction of the hearing tribunal, if the testimony is available in a form taken under oath, as by deposition or at a preliminary proceeding or prior trial, or if uttered as a dying declaration, due process, out of *necessity* only, accepts the testimony without appearance. But this is by force of irremediable circumstances only, not in any measure to accommodate to pleasure or convenience merely. (*Kirby v. United States*, 174 U. S. 47, 61; *Motes v. United States*, 178 U. S. 458; *Mattox v.*

United States, 156 U. S. 237, 242-243; *Dowdell v. United States,* 221 U. S. 325, 329 *et seq.; West v. Louisiana,* 194 U. S. 258.)

To tolerate violations of so basic a human right as involved at bar—right of presence at trial—on basis merely of convenience and accommodation, and without compulsion of necessity, is unseemly, and is unbecoming to civilized estimates of man's worth and dignity; such action in such premises is *particularly* violative of Constitutional requirements of fair trial by due process.

E. The Depositions at Bar Particularly Required Presence, Confrontation and Cross-examination.

As set forth in the Statement of the Case the depositions at bar were not only taken *ex parte* but were characterized by grossly objectionable and leading examination, and were of a character particularly requiring the restraints of adversary proceedings, with presence of the person accused and with confrontation and cross-examination.

No discipline or restraint whatever was imposed by the acting Hearing Officer, and, of course, no objections were interposed, neither petitioner nor counsel being present. On offer of the depositions in the Los Angeles proceedings, moreover, not a single objection to the questions and answers was sustained [R. 133-199], although violations of fair examination and of the most basic rules of evidence occurred many, many times over.

The full examination of the witnesses appears in the Record at pages 229-266. The witnesses were examined by offensively leading and "educative" questions [*e.g.*: "Q. You know this because of your familiarity with the communist procedures, is that correct? A. Yes."—R.

238], and were invited and encouraged to express merest conclusions, opinions, and even "guesses". [See R. 234-235, 237-239, 246, 249-252, 261-266.] They were asked, even, to state whether as witnesses they had "no reason to doubt" the charges against petitioner, or whether any persons attending given meetings were known to them *not* to be members of the Communist Party. Witness:

> "Q. Based upon your experience in the Communist Party, do you have any reason for doubting that David Hyun was a member of the Communist Party? A. No reason at all."
>
> —[R. 263.]

> "Q. Were these meetings to the best of your knowledge and belief concerned with Communist Party business? A. What was that?
>
> Q. Were these meetings to the best of your knowledge and belief concerned with Communist Party business? A. I do.
>
> Q. Was there anyone at these meetings who was known to you as not a member of the Communist Party? A. Not that I know of.
>
> Q. Can you state definitely that all the persons at this meeting were members of the Communist Party? A. Well, according to my thinking anybody who is in that certain particular night there that they call meetings, who are there, well, I think they are communists.
>
> Q. You kno wthis because of your familiarity with the communist procedures, is that correct? A. Yes."
>
> —[R. 238.]

> "A. Well, from my own opinion I think he is a communist. Otherwise I have never seen his card but by seeing him at the meetings.
>
> Q. Did you have any reason for believing that he was not a communist? A. I have no reason to

believe that he is not a communist. He must be one because of being at the meetings.

Q. Because he attended closed meetings of the Communist Party which you knew was not open to anyone else but Communist Party members, is that correct? A. That's correct, because I know it is a meeting and nobody else would be in it."

—[R. 229.]

Additionally, the witnesses were alleged accomplices, and their testimony as such was therefore particularly requiring of confrontation and cross-examination.

It must be remembered, also, that the area of the questioning in the depositions affected merest issues of speech and association, and related *in se* to no single wrongful act or undertaking. In consequence, questions of understanding, meaning, purpose and intent, not to say *scienter* (*cf. Galvan v. Press,* 347 U. S. 522), were, or possibly might be, crucial in comprehending or assessing and evaluating any asserted act, expression or association. Fair examination was, therefore, particularly crucial. It was not had. In place, an examination so partial and leading as to be virtually word-giving, was conducted.

Because of the character of the witnesses, the examination and the subject matter of the depositions at bar, therefore, there was particularly required in the instant case observance of the requirements of presence, confrontation and cross-examination.

F. The Depositions at Bar Were Within the Area of the First Amendment.

A final circumstance aggravating the vice of denying below a hearing safeguarded by presence of the accused and counsel is the fact that the charge and testimony in the case at bar fell definitionally within the area of associa-

tion, assembly, speech and opinion, protected in the first instance by the First Amendment.

The Constitution requires particularly jealous and exacting inquiry where limitations of right affect the area of the First Amendment, whether the issue of limitation arises as one primarily of fact (*Pennekamp v. Florida*, 328 U. S. 331, 335; *Cantwell v. Connecticut*, 310 U. S. 296; *Craig v. Harney*, 331 U. S. 367, 373; *Fiske v. Kansas*, 274 U. S. 380, 385), or of law, policy and interpretation (*Winters v. New York*, 333 U. S. 507; *United States v. Carolene Products Co.*, 304 U. S. 144, 152, n. 4; *Thornhill v. Alabama*, 310 U. S. 88, 95; *Schneider v. State of New Jersey*, 308 U. S. 147, 161; *Bridges v. California*, 314 U. S. 252, 262-263.)

Grave danger even to citizen speech and association lies in permitting in deportation hearings penalties on speech safeguarded so little by rules of fair hearing as to reduce guilt to matters only of merest association, or of conjecture, surmise or malice expressed only by witnesses examined without the safeguard of the presence of either the accused or his counsel.

Conclusion.

At bar petitioner was not present at his trial. He was present at proceedings amounting only to a sham; the substance of his entire cause was held in Hawaii by "depositions", without his attendance, though the witnesses could have been brought to confront him at his hearing, save for government convenience and accommodation only.

Petitioner was in custody by the Service throughout his hearings and was not rendered present at the Hawaiian depositions. Only after the fact was he even advised he

conceivably could have been present, had he "asked" so, and had he been positioned to provide private financing of his transportation there and return, together with "guards" to secure him—an alternative petitioner was without means, in any event, to invoke.

The exact proceedings at bar would have been rejected and condemned as plainly violating minimum Constitutional rights had the proceedings below been criminal proceedings for meanest misdemeanor, or been insanity confinement proceedings or proceedings to authorize sterilization operation. That is, were society in the instant case purposing to asexualize petitioner, by painless operation, and to deprive him thereby of future, unborn children, or right thereof, there could not have been had the arbitrary, disregardful and right-denying "hearing" or "trial" undertaken below, denying mandatory right of confrontation and presence. Yet at bar the deportation proceedings purposed equal, if not greater cost and loss, including, specifically, forceable separation from wife and two *living* children, loved and loving. Again, were society intending only to confine petitioner for treatment and cure of claimed insanity, it could not be conceived there could have been held such proceedings as below—*ex parte* depositions without even secured right of presence by the accused. Yet life banishment and exile is longer lasting by far in injury to liberty than curative confinement for mental illness, and, moreover, there is not present the circumstance of want of mental comprehension easing pain or consequence. Finally, were society purposing in any manner to punish petitioner for crime, in great or minor measure, and

particularly if in manner affecting liberty or life, the procedure had below would be held violative of Constitutional fair hearing *out of hand*. Yet the "punishment" at bar surpasses in consequence most criminal causes, and equals any—short at least of offenses punishable with certainty by death.

The Service, and the Court below, justified the peremptory proceedings below, and disregard of the fundamental security of right of presence, on the basis merely—and avowedly—that deportation proceedings are "civil", and that by token of this premise alone, deposition process was fair enough process there, and right of confrontation did not obtain. This was error, and fundamental error.

In civil proceedings amounting only to contests affecting *property* matters, or money, and occurring between private and equal litigants only, there may be fairness in assuming that rights not asserted even at the premium of costly, distant action, as attendance at foreign "depositions," represent in reasonable probability only balanced compromises had after weighing of costs against stakes, and that what is ill-defended is likely also small of worth and little needful of defense. It is otherwise entirely where proceedings, however denominated, affect forfeitures of liberty, person or life, and where such are government-instituted, and involuntary. There, whether the proceedings be denominated "civil" or "criminal", a fair hearing must be *provided*, not merely be not prohibited, and there foreign depositions without confrontation and right of presence cannot be had save in cases of *necessity*. Grave process requires hearing rendered *sure* of fairness

to be "due". Forfeiture of liberty, body or life, whether purposed by society as punishment or not, requires hearing commensurate with its nature. Process, like punishment, must fit the cause; and before heaviest blows, there must be fairest hearing and this without regard for fine distinctions as to form or "purpose" in society's act.

Society cannot afford to be careless with liberty, person or death.

Respectfully submitted,

JOHN W. PORTER,
Attorney for Petitioner.

WILLIAM B. MURRISH,
HERBERT W. SIMMONS, JR.,
Of Counsel.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Constitutional provisions and regulations involved	2
Statement	3
Summary of argument	20
Argument	28
I. The record establishes that petitioner was in fact accorded every opportunity to defend the charges against him, to have government witnesses cross-examined, and to meet their testimony with rebuttal testimony	29
II. Since deportation proceedings are not governed by the constitutional limitations imposed on criminal trials, there is no absolute right that the alien be personally present when the witnesses are examined	41
III. The use of deposition testimony in deportation proceedings is in accord with due process	48
A. The use of deposition testimony has long been recognized as a fair method of procedure	49
B. The use of deposition testimony was authorized by the regulations governing deportation hearings	52
IV. No circumstances peculiar to this case rendered the use of deposition testimony a denial of due process	65
Conclusion	71

CITATIONS

Cases:

Anderson Nat. Bank v. *Luckett*, 321 U. S. 233	29
Argo, The 2 Wheat, 287	49

Cases—Continued

Page

Barber v. *Gonzales*, 347 U. S. 637 42
Berkman v. *Tillinghast*, 58 F. 2d 621 ..... 24, 46–47, 56, 64, 65
Betts v. *Brady*, 316 U. S. 455 29
Bhagat Singh v. *McGrath*, 104 F. 2d 122, certiorari dismissed, 308 U. S. 629 ..... 46, 56, 63, 64
Bilokumsky, U. S. ex rel. v. *Tod*, 263 U. S. 149 .. 42, 48, 55
Bridges v. *Wixon*, 326 U. S. 135 ..... 42, 55
Bugajewitz v. *Adams*, 228 U. S. 585 42
Carlson v. *Landon*, 342 U. S. 524 ..... 5, 23, 42, 68
Carlson v. *Landon*, 186 F. 2d 183; 187 F. 2d 991 .. 5
Cella v. *United States*, 208 F. 2d 783, certiorari denied, 347 U. S. 1016 61
Channan Singh v. *Haff*, 103 F. 2d 303 64
Choy Gum v. *Backus*, 223 Fed. 487 55
Diamond, U. S. ex rel. v. *Uhl*, 266 Fed. 34 ..... 55, 65
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134 ..... 51, 59
Galvan v. *Press*, 347 U. S. 522 ..... 37, 46, 70
Gitto et al v. "*Italia*", *Societa Anonima di Navigazione*, 28 F. Supp. 309 50
Graham v. *United States*, 99 F. 2d 746 53
Harisiades v. *Shaughnessy*, 342 U. S. 580 ..... 23, 41
Helvering v. *Mitchell*, 303 U. S. 391 42
Hepner v. *United States*, 213 U. S. 103 45
Hyam v. *American Export Lines*, 213 F. 2d 221 .. 50
Hyun v. *Landon*, 186 F. 2d 190 5
Impastato, U. S. ex rel. v. *O'Rourke*, 211 F. 2d 609, certiorari denied, 348 U. S. 827 55
Japanese Immigrant Case, The, 189 U. S. 86 .. 24, 42, 48
Johnson v. *Zerbst*, 304 U. S. 458 65
Jordan v. *DeGeorge*, 341 U. S. 233 43
Karpathiou, U. S. ex. rel. v. *Schlotfeldt*, 106 F. 2d 928 64
Kishan Singh v. *District Director*, 83 F. 2d 95, certiorari denied, 299 U. S. 561 ..... 55, 56, 64, 65
Lewis v. *Frick*, 233 U. S. 291 42
Loufakis v. *United States*, 81 F. 2d 966 53
Low Wah Suey v. *Backus*, 225 U. S. 460 ..... 42, 45, 53
Mahler v. *Eby*, 264 U. S. 32 42

Cases—Continued

	Page
Marcello v. *Bonds*, 349 U. S. 302	42, 57
Moncado v. *Ramsey*, 167 F. 2d 191	64
Navarette-Navarette v. *Landon*, 223 F. 2d 234	55
Ng Wing, U. S. ex rel. v. *Brough*, 15 F. 2d 377	55
Nishimura Ekiu v. *United States*, 142 U. S. 651	42
Patapsco Insurance Co. v. *Southgate*, 5 Pet. 604	49
Pettibone v. *Derringer*, 4 Wash. C. C. R. 215	49
Ranieri v. *Smith*, 49 F. 2d 537, certiorari denied, 284 U. S. 657	65
Singh v. *District Director*, 96 F. 2d 969	24, 46, 56, 64, 68
United States v. *Goldstein*, 271 Fed. 838	65
United States v. *Minker*, No. 35 this Term, decided January 16, 1956	53
United States v. *One Case of Hair Pencils*, 1 Paine's C. C. R. 400	49
United States v. *Vivian*, 224 F. 2d 53, certiorari denied January 23, 1956, No. 322, this Term	53, 61
United States v. *Zucker*, 161 U. S. 475	23, 43–45
Vajtauer v. *Commissioner*, 273 U. S. 103	68
Weinbrand v. *Prentis*, 4 F. 2d 778	64
Whitford v. *Clark County*, 119 U. S. 522	49
Willapoint Oysters v. *Ewing*, 174 F. 2d 676, certiorari denied, 338 U. S. 860	60
Wong Yang Sung v. *McGrath*, 339 U. S. 33	42, 53, 56
Zakonaite v. *Wolf*, 226 U. S. 272	23, 42, 43, 48

Constitution and Statutes:

United States Constitution, Fifth Amendment	2
United States Constitution, Sixth Amendment	2, 28
Administrative Procedure Act (5 U. S. C. 1006) Section 7	51, 59, 60, 65
Appropriation Act of September 27, 1950, 64 Stat. 1048	57
Customs Administrative Act of June 10, 1890, c. 407, 26 Stat. 131, sec. 9	43
Immigration Act of 1917, as amended (39 Stat. 889, 58 Stat. 714, 8 U. S. C. (1946 ed.) 152), Section 16	53, 56
Internal Security Act of 1950	37

Constitution and Statutes—Continued Page

Judiciary Act of Sept. 24, 1789 (Sec. 30, 1 Stat. 73, 88–90) 49
5 U. S. C. 498 (Dept. of Interior) 51
5 U. S. C. 118k (d) (Civil Service Commission 51
7 U. S. C. 499m (d) (Perishable Commodities Act) 51
7 U. S. C. 1603 (Federal Seed Act) 51
8 U. S. C. 1443d, 1446 (b) (Immigration and Nationality Act of 1952) 51
8 U. S. C. (1946 ed.) 152 63
8 U. S. C. 1253 (h) 70
15 U. S. C. 49 (Federal Trade Commission Act) 51
15 U. S. C. 155 (China Trade Act) 51
15 U. S. C. 717m (Natural Gas Act) 51
16 U. S. C. 825F (Federal Power Act) 51
19 U. S. C. 1333 (d) (Tariff Act) 51
22 U. S. C. 1623 (d) (International Claims Act) 51
25 U. S. C. 70q (Indian Claims Act) 51
26 U. S. C. 1114 (Tax Court) 51
29 U. S. C. 161 (National Labor Relations Act) 51
30 U. S. C. 475 (j) (Coal Mine Safety Board of Review) 51
33 U. S. C. 927 (Longshoremen's and Harbor Workers' Comp. Act) 51
35 U. S. C. 23–24 (Patent Act) 51
47 U. S. C. 409 (h) (Federal Communications Commission Act) 51
49 U. S. C. 12 (Interstate Commerce Act) 51
49 U. S. C. 459, 644 (Civil Aeronautics Act) 51

Regulations:

8 C. F. R., 1949 Ed.:
150.1 53
150.6 54
8 C. F. R. 1951 Supp. (15 Fed. Reg. 7637–7639) 52, 57
151.1 57
151.2 3, 57, 58, 59, 60, 61, 62
151.3 60, 61

Regulations—Continued	Page
1952 Rev.:	
242.52	62
287.4	62
15 F. R. 1297–1302	57
Rules:	
Federal Rules of Civil Procedure:	
Rule 26 (d)	25, 49, 62
Rules 26–33	50
Rules 30 (b) and (d)	50
Miscellaneous:	
Besterman, *Commentary on the Immigration and Nationality Act*, Title 8, U. S. C. A. (1953 ed.), pp. 48–50	57
The Immigration and Naturalization Systems of the United States, S. Rep. 1515, 81st Cong., 2d sess	54
Immigration Manual (Govt. Print. Off., 1946), Secs. 756.8, 982–984	56
The Immigration Service (Dept. of Labor *Mimeograph*, 1940)	55
Record in *Hyun* v. *Landon*, No. 35 O. T. 1951	7
V Wigmore, *Evidence* (3d ed., 1940):	
Sec. 1365, p. 27	39
Sec. 1371, pp. 51–53	64